United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

77-7105

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DOCKET NO. 77-7105

- x

OSCAR ROBERTSON, et al.,

Plaintiffs,

- against -

NATIONAL BASKETBALL ASSOCIATION, et al.,

Defendants.

- x

AMERICAN BASKETBALL ASSOCIATION, et al.,

Cross-Claimants,

- against -

NATIONAL BASKETBALL ASSOCIATION, et al.,

Cross-Defendants.

- x

R. T. ECKLES, Trustee in Bankruptcy for Mountain States Sports, Inc., d/b/a/ Utah Stars,

Cross-Claimant-Appellant,

- against -

FREDERICK P. FURTH,

Appellee.

- x

On Appeal From The United States District Court
For The Southern District Of New York

APPENDIX FOR CROSS-CLAIMANT-APPELLANT

WATSON LEAVENWORTH KELTON & TAGGART
Special Counsel Appearing for
Cross-Claimant-Appellant
100 Park Avenue
New York, New York 10017
(212) 683-4221

OF COUNSEL:

Thomas V. Heyman
Maxim H. Waldbaum
100 Park Avenue
New York, New York 10017

Robert G. Pierce
Butler, Landrum, Pierce and Turner
720 Kipling, Suite 201
Lakewood, Colorado 80215

FILED
NOV 25 1977

PAGINATION AS IN ORIGINAL COPY

INDEX

	PAGE
Docket Entries	A1
Notice of Application of Frederick P. Furth to Withdraw as Counsel for Cross-Claimants	A3
Affidavit of Frederick P. Furth, Sworn to January 17, 1977	A5
Exhibit A to Affidavit of Frederick P. Furth	A15
Exhibit B to Affidavit of Frederick P. Furth	A19
Exhibit B1 to Affidavit of Frederick P. Furth	A60
Exhibit C to Affidavit of Frederick P. Furth	A97
Exhibit D to Affidavit of Frederick P. Furth	A99
Exhibit E to Affidavit of Frederick P. Furth	A103
Affidavit of Robert S. Carlson, Sworn to February 23, 1977	A112
Exhibit A to Affidavit of Robert S. Carlson	A119
Exhibit B to Affidavit of Robert S. Carlson	A122
Exhibit C to Affidavit of Robert S. Carlson	A138
Exhibit M to Affidavit of Michael A. Cardozo, Sworn to January 6, 1977, in Support of Application for Temporary Restraining Order And Preliminary Injunction	A146
Order of United States District Court for the Southern District of New York Granting Application to Withdraw as Counsel for Cross-Claimants	A164
Notice of Appeal	A165

DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT — U.S.C.A. No. 77-7105

OSCAR ROBERTSON, et al., Plaintiffs,	:	U.S. DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK
v.	:	
NATIONAL BASKETBALL ASSOCIATION, et al., Defendants.	:	CASE NO. 70 Civ. 1526 JUDGE CARTER
AMERICAN BASKETBALL ASSOCIATION, et al., Cross-Claimants.	:	
v.	:	
NATIONAL BASKETBALL ASSOCIATION, et al., Cross-Defendants.	:	

DATE	PROCEEDINGS
January 21, 1977	Filed Notice of Application to Withdraw as Counsel for Cross-Claimants
January 24, 1977	Filed Affidavit of Michael A. Cardozo Attached to Application for Temporary Restraining Order and Preliminary Injunction
February 14, 1977	Filed Memorandum in Opposition to the Application of Frederick P. Furth to Withdraw as Counsel for Cross-Claimant R. T. Eckles,

DOCKET ENTRIES

DATE	PROCEEDINGS
	Trustee in Bankruptcy for Mountain States Sports, Inc., d/b/a Utah Stars, with Attached Exhibits
February 24, 1977	Filed Affidavit of Frederick P. Furth with Attached Exhibits
February 24, 1977	Filed Affidavit of Robert S. Carlson with Attached Exhibits
March 1, 1977	Filed Notice of Appeal
March 7, 1977	Filed copy of Exhibits to Affidavit of Michael A. Cardozo in Support of Application for Temporary Restraining Order and Preliminary Injunction with Attached Certificate of Thomas V. Heyman

NOTICE OF APPLICATION OF FURTH

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OSCAR ROBERTSON, et al., Plaintiffs, -against- NATIONAL BASKETBALL ASSOCIATION, et al., Defendants.	:	70 Civ. 1526 (RLC) NOTICE OF APPLICATION TO WITHDRAW AS COUNSEL FOR CROSS-CLAIMANTS
AMERICAN BASKETBALL ASSOCIATION, et al., Cross-claimants, -against- NATIONAL BASKETBALL ASSOCIATION, et al., Cross-defendants.	:	

TO: ALL COUNSEL AND NEW VIRGINIA SQUIRES; SAN DIEGO PROFESSIONAL BASKETBALL CORPORATION; INDIANA PROFESSIONAL SPORTS, INC.· DENVER ROCKETS BASKETBALL, LTD.; R.T. ECKLES TRUSTEE IN BANKRUPTCY FOR MOUNTAIN STATES SPORTS, INC.; AND TRIANGLE SPORTS, INC.

PLEASE TAKE NOTICE THAT on February 22, 1977, at 10:00 a.m., before the Hon. Robert L. Carter, United States District Court, Foley Square, New York, NY,Furth, Fahrner & Wong and Frederick P. Furth and Daniel S. Mason and Sommer, Tinkham, Barnard & Freiberger will apply for an Order seeking that they be permitted to withdraw as counsel for all American Basketball Association cross-claimants herein.

**

**

LAW OFFICES
FURTH, FAHRNER & WONG
ROSS BUILDING, SUITE 1330
SAN FRANCISCO, CA 94104
TEL. (415) 433-2070

NOTICE OF APPLICATION OF FURTH

The application will be based upon the attached affidavit of Frederick P. Furth and all prior proceedings herein.

DATED: January 17, 1977
San Francisco, California.

FREDERICK P. FURTH
DANIEL S. MASON
FURTH, FAHRNER & WONG

SOMMER, TINKHAM, BARNARD & FREIBERGER

By _____

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OSCAR ROBERTSON, et al.,

Plaintiffs,

-against-

NATIONAL BASKETBALL ASSOCIATION, et al.,

Defendants.

AFFIDAVIT OF FREDERICK P. FURTH

AMERICAN BASKETBALL ASSOCIATION, et al.,

Cross-Claimants,

-against-

NATIONAL BASKETBALL ASSOCIATION, et al.,

Cross-Defendants.

70 Civ. 1526 (RLC)

STATE OF CALIFORNIA)
) ss.:
CITY AND COUNTY OF SAN FRANCISCO)

FREDERICK P. FURTH, being duly sworn, deposes and says:

1. I am one of the attorneys for the American Basketball Association cross-claimants other than Long Island Sports and make this affidavit pursuant to Local Rule 4 in support of the application of Frederick P. Furth, Daniel S. Mason, Furth, Fahrner & Wong and Sommer, Tinkham, Barnard & Freiberger for leave to withdraw as counsel herein.

2. In January, 1974, I was retained by the Commissioner of the American Basketball Association (herein "ABA") and its Board of Trustees to institute certain litigation against the National Basketball Association cross-defendants.

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3. On January 30, 1974, I filed, on behalf of the American Basketball Association and its then member teams, an action in the United States District Court for Northern California seeking damages for violations of the antitrust laws, breach of contract and fraud against the National Basketball Association and its then member teams. Said action was styled American Basketball Association, et al., v. National Basketball Association, et al., No. C-74-0235 RFP (herein "San Francisco action").

4. In September, 1974, pursuant to stipulation, I filed the cross-claims asserted herein by the American Basketball Association cross-claimants, on behalf of all those entities other than Long Island Sports (New York Nets).

5. Those ABA cross-claims were filed on behalf of the following entities:

AMERICAN BASKETBALL ASSOCIATION PARTY CROSS-CLAIMANT	
American Basketball Association	
Denver Rockets Basketball, Ltd.	(Denver Rockets)
Indiana Professional Sports, Inc.	(Indiana Pacers)
Mountain States Sports, Inc.	(Utah Stars)
The Munchak Corp.*	(Carolina Cougars**)
Professional Sports, Ltd.	(San Antonio Spurs)
San Diego Professional Basketball Corporation	(San Diego Conquistadors)
New Virginia Squires	(Virginia Squires)

6. Thereafter, this Court granted motions of additional parties to be joined as ABA party cross-claimants. These party cross-claimants were:

---

* Subsequently Spirits of St. Louis, LP.

** Subsequently Spirits of St. Louis.

Additional Party Cross-Claimant

Denver Nuggets Basketball, Ltd. (Denver Nuggets)

Arena Sports, Inc. (Indiana Pacers)

Triangle Sports, Inc. (Memphis Sounds)

7. Further, this Court has ordered the substitution of R. T. Eckles, Trustee in Bankruptcy for Mountain States Sports, Inc., in place of Mountain States Sports, Inc.

8. Denver Nuggets Basketball, Ltd., has represented that it has succeeded to the cause of action asserted herein by Denver Rockets Basketball, Ltd.; Arena Sports, Inc. has represented that it has succeeded to the cause of action asserted herein by Indiana Professional Sports, Inc. I have taken no position with respect to these issues.

9. In June, 1976, the Commissioner of the American Basketball Association and its Board of Trustees, consisting of the then present owners of the American Basketball Association franchises for the Indiana Pacers (Arena Sports, Inc.) New York (Long Island Sports, formerly Long Island Sports Enterprises, Inc.) San Antonio (Professional Sports, Ltd.) Denver (Denver Nuggets Basketball, Ltd.), St. Louis (Spirits of St. Louis, L.P., formerly Munchak Corporation), and Kentucky (a non-party), as well as the American Basketball Association itself, informed me that they had reached an agreement in principle to compromise and settle the cutstanding litigation herein.

10. At a pre-trial conference on June 18, 1976, I so informed this Court. I further noted to the Court at that time, however, that the agreement in principal to compromise had been consummated by only certain of the American Basketball Association parties herein, to wit:

**

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those noted in paragraph 9 above, and that certain others had reached no such settlement.

11. Neither I nor any member or associate of either my firm nor that of the Sommer, Tinkham firm participated in the negotiations leading to the aforesaid June, 1976 agreement in principal to compromise the litigation by certain American Basketball Association cross-claimants herein.

12. I am informed, however, that said compromise included, inter alia, an agreement that four of the American Basketball Association cross-claimants herein, to wit: Denver Nuggets Basketball, Ltd. (Denver); Arena Sports, Inc. (Indiana); Professional Sports, Ltd. (San Antonio) and Long Island Sports (New York) would become members of the cross-defendant National Basketball Association, commencing with the 1976-77 basketball playing season. I am further informed that these entities have agreed to indemnify the National Basketball Association cross-defendants for any judgment which might be entered as a result of American Basketball Association entity claims prosecuted herein against the NBA cross-defendants herein. Counsel additionally has informed me that Denver, Indiana, San Antonio and New York would, by virtue of the National Basketball Association's joint venture agreement, be responsible for a proportionate share of the damages received by any American Basketball Association entity as a result of the prosecution of American Basketball Association cross-claimants' claims herein. I have attached hereto as Exhibit A the Affidavit of Robert S. Carlson filed in the San Francisco action in November, 1976 reflecting said information by counsel.

13. American Basketball Association, Denver, San Antonio, Indiana and St. Louis have instructed me to file

with prejudice dismissals of their cross-claims herein. This I have done. Further, New York has instructed its counsel, Mr. Carlson, to file with prejudice dismissal of its cross-claims, and Mr. Carlson has so complied.*

14. The following entities remain American Basketball Association cross-claimants herein, to wit: R. T. Eckles, Trustee in Bankruptcy for Mountain States Sports, Inc.; New Virginia Squires; Indiana Professional Sports, Inc., (predecessor to dismissing cross-claimant Arena Sports, Inc.); Denver Rockets Basketball, Ltd. (predecessor to dismissing cross-claimant Denver Nuggets Basketball, Ltd.); Triangle Sports, Inc. and San Diego Professional Basketball Corporation.

15. Certain of the non-settling ABA cross-claimants herein have expressed their view that the compromise and settlement by certain of my clients herein is itself part of an anti-competitive scheme involving these clients, the NBA cross-defendants and certain third-parties. Attached hereto as Exhibit B is an action filed by cross-claimant New Virginia Squires against certain of my other clients in the United States District Court in Norfolk, Virginia.

16. As a result of the aforesaid compromise and settlement of certain of my clients herein, and subsequent events relating thereto, a conflict has developed vis-a-vis my continued representation of the remaining cross-claimants herein.

17. On September 8, 1976, Peter Flournoy, Esq., representing San Diego Professional Basketball Corporation, appeared before this Court, urging that this Court hold me responsible for the continuing prosecution of the American

---

* Kentucky, the remaining American Basketball Association "settling" entity, was not a party to this litigation.

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Basketball Association cross-claim against the National Basketball Association cross-defendants. This Court thus responded to Mr. Flournoy as follows:

"THE COURT: What you are telling me, what the reality is, if the ABA and these other clubs settle and Mr. Furth is counsel, the probability is that he would not be able, having represented the ABA which has now settled, he probably would not be in a position to represent any contending club under any circumstances, not in this court. If he were to attempt to represent I think there would be a motion made in regard to the conflict of interest so that problem is put aside, but it appears to me that your action, if you want to maintain it and pursue it, remains. (Transcript 19.) (Emphasis added.)

* * *

"THE COURT: I think it would be very difficult in my judgment for Mr. Furth, having represented the ABA and the ABA having settled this litigation and being a party to the settlement and approving the settlement and so forth, I think Mr. Furth would be in a very difficult position without the indemnification to pursue this litigation on behalf of any member team. I think he would be.

* * *

"THE COURT: I am saying to you that Mr. Furth having represented the ABA, which is the overall entitity that has settled and wants

**

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out of the litigation, that without the indemnification I think Mr. Furth would have a difficult position to attempt to represent you and to continue this lawsuit.

"MR. FLOURNOY: I really believe that's incorrect, but I don't have the cases to point that out to you.

"THE COURT: In any event --

"MR. FLOURNOY: It's been my general experience, your Honor, sure some people can settle out, but the person charged with the litigation continues on for those plaintiffs who want to continue to litigate.

"THE COURT: The point is that the party that settled out, the main party that he represents is the ABA and he is representing these member clubs because they are a part of the ABA, but in any event let me just put it this way: I don't see any way, Mr. Flournoy, that I can find on the basis of our argument that I can indicate that this indemnification agreement is something that I would bar. I don't see how I can do that. There is no basis for me to do that. (Transcript 24-25).

Attached as Exhibit B(1) is the complete transcript of the Court's September 8, 1976 hearing.

18. On November 22, 1976, the very issues presented in the instant Application for Withdrawal came before United States District Court for the Northern District of California in the San Francisco action (Zirpoli, J.), upon the oral motion of Furth, Fahrner & Wong to be relieved as counsel therein. The San Francisco action had been filed in 1969 by my office on behalf of the American Basketball Association

and their then existing teams against the National Basketball Association and its then existing teams. Said action remained pending as to certain of the original parties through 1976, although prosecution had been stayed by this Court after the American Basketball Association cross-claims were filed herein in September, 1974.

19. In ordering that I be relieved as counsel, Judge Zirpoli stated in open court:

"THE COURT: Well, I am satisfied that there is such a conflict here that it would be entirely improper for me to continue Mr. Furth as counsel for the plaintiffs. He represented the ABA and the named plaintiffs at the request and direction of the Trustees of ABA. Is that what you call them? And the Commissioner. And having been delegated to exercise this responsibility, he did so, I assume, at the time without for one moment believing that this type of conflict would arise. So that we would have to say that his representation at that time of all plaintiffs, the ABA and the Commissioner and the trustees, was a good-faith representation.

"It subsequently developed that this litigation is in a sense settled by reason of that settlement, except for certain parties who now make claims, on the theory that they are not bound thereby, or that the terms and conditions are such that the agreement is a nullity. There are others who have dismissed, a substantial number of them. And now Mr. Furth finds himself in a very definite conflict. He cannot have repre-

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sentative [sic] people who dismissed and who are anxious to have all of this litigation terminated themselves, and at the same time represent the people who don't want it terminated." (Emphasis added).* Exhibit C, attached hereto.

20. Attached hereto as Exhibit D is a copy of said Order and Findings.

21. On September 7, 1976, this Court addressed me in open Court as follows with respect to the question presented herein:

"I think what you have to do, Mr. Furth, and you know our rules, you file an affidavit and you will be relieved." p. 104 transcript dated September 7, 1976, attached hereto as Exhibit E.

22. This cause was initially scheduled for jury trial commencing June, 1976. To my knowledge, the Court has not yet set a new trial date herein.

**

**

---

* See also, e.g., Statement of Allen Schwartz, counsel for New Virginia Squires, at September 7, 1976 hearing at pg. 98: "... there is an inherent conflict between the position of the Squires and all the other teams in the ABA and some of the other defendants in this action and the ABA and the NBA."

AFFIDAVIT OF FURTH

WHEREFORE, it is respectfully requested that the Application for leave to withdraw as counsel be granted.

DATED: January 17, 1977
San Francisco, California.

Frederick P. Furth

Subscribed and sworn to before me on this 17 day of January, 1977.

Arthur K. Martin
Notary Public

ARTHUR L. MARTIN
NOTARY PUBLIC-CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
My Commission Expires Sept. 11, 1978

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EXHIBIT A TO AFFIDAVIT OF FURTH

ROBERT S. CARLSON
SPENGLER, CARLSON, GUBAR,
CHURCHILL & BRODSKY
280 Park Avenue
New York, New York 10017
Telephone: (415) 682-4444

Attorneys for Counterdefendant
American Basketball Association,
and Special Counsel for Denver
Nuggets, San Antonio Spurs,
New York Nets and Indiana Pacers

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMERICAN BASKETBALL ASSOCIATION, et al., Plaintiffs, v. NATIONAL BASKETBALL ASSOCIATION, et al., Defendants.	No. 51055 AJZ
NATIONAL BASKETBALL ASSOCIATION, et al., Counterclaimants, v. AMERICAN BASKETBALL ASSOCIATION, et al., Counterdefendants.	AFFIDAVIT OF ROBERT S. CARLSON IN RESPONSE TO MEMORANDUM

Robert S. Carlson, being duly sworn, deposes and says:

1. I am a member of the firm of Spengler, Carlson, Gubar, Churchill & Brodsky, and am one of the attorneys for the American Basketball Association and special counsel for Denver Nuggets, San Antonio Spurs, New York Nets and Indiana Pacers, and make this affidavit in response to the Memorandum dated November 9, 1976 (herein "Memorandum") submitted by R. T. Eckles,

EXHIBIT A

San Diego Professional Basketball Corporation and New Orleans Buccaneers, Inc. (herein "moving entities").

2. The Memorandum argues that the execution of agreements to indemnify the NBA defendants in this action in connection with the settlement of the Robertson case* should not be allowed to disqualify Frederick P. Furth. Such agreements were executed by the Robertson cross-claimants, the New York Nets, the San Antonio Spurs, the Denver Rockets, and the Indiana Pacers in connection with their acquisition of NBA franchises and dismissal of their Robertson cross-claims.

3. The Memorandum, at page 3 states, "...After all, it is not the settlement which creates the alleged conflict but the curious agreement of the ABA teams to indemnify the NBA against further litigation, liability or expense. There is no reason why that fact should be permitted to disqualify plaintiff's counsel..."

4. I respectfully suggest that said statement is incorrect. The settlement discussions took place and agreement in principle was reached during the month of June, 1976 in Hyannis, Massachusetts. During those discussions I was present as counsel for the ABA, the New York Nets, San Antonio Spurs, Indiana Pacers and the Denver Rockets. Mr. Furth was not present and did not participate in such

---

* The cross-claims which were settled in Robertson are set forth in Exhibit "F" to the supplemental affidavit of Michael Cardozo, sworn to on October 15, 1976. As a part of the settlement of the Robertson case, cross-claimants Denver Rockets Basketball Ltd. (the Denver Nuggets), Indiana Professional Sports Inc. (the Indiana Pacers), Long Island Sports Enterprises, Inc. (the New York Nets) and Professional Sports Ltd. (the San Antonio Spurs) received NBA franchises. The cross-claim remains pending with respect to San Diego Professional Basketball Corporation and Mountain States Sports Inc. as well as others.

BEST COPY AVAILABLE

discussions. Upon my return from Hyannis, I spoke both to Mr. Furth and Mr. Mason in Mr. Furth's office advising them that a conflict of interest had been created by settlement of the Robertson cross-claims and that, in my view, Mr. Furth could no longer represent plaintiffs in this action nor any of the cross-claimants in Robertson. I instructed Mr. Furth on behalf of my clients to take no further action. The conflict, in my view, was created by the settlement and the shifting allegiance of the Nets, Nuggets, Spurs and Pacers rather than the indemnity agreement. Upon joining the NBA, the Nets, Nuggets, Pacers and Spurs became party to a Joint Venture Agreement to which all NBA teams are party. I am attaching hereto as Exhibit "A" a copy of such Joint Venture Agreement which in salient part provides:

> "The net losses of the Joint Venture shall be chargeable in the same proportion as the capital contributions made on the basis of gross gate receipts, up to the amount of such contributions. Thereafter any net losses of the Joint Venture shall be chargeable equally to each of Joint Venturers."

5. The Joint Venture Agreement by its terms is governed by the law of the State of New York. Under New York law, joint ventures are in the nature of partnerships and are governed by partnership law. Under the New York Partnership Act, each partner is jointly and severally liable for the wrongful acts of any partner acting in the course of partnership business. It is manifestly impossible, therefore, for Mr. Furth to continue to represent some of his ABA clients against others of his former ABA clients with respect to the very same matter.

**

6. I would also note that the moving entities have threatened suit against mine. This threat, in and of itself, creates another conflict for Mr. Furth making his continued representation impossible.

7. I note in conclusion that the indemnity agreement about which the moving entities complain was discussed before Judge Carter during the September 8, 1976, hearing of motion to vacate a preliminary injunction in Robertson which barred consolidation of the two leagues. Judge Carter stated with respect to that agreement:

> "The point is that the party that settled out, the main party that he represents is the ABA and he is representing these member clubs because they are a part of the ABA, but in any event let me just put it this way: I don't see any way, Mr. Flournoy, that I can find on the basis of our argument that I can indicate that this indemnification agreement is something that I would bar. I don't see how I can do that. There is no basis for me to do that."

A copy of the transcript of such hearing is attached as Exhibit "B" to the Furth affidavit.

/s/

ROBERT S. CARLSON

Sworn to before me this

22 day of November, 1976.

Notary Public

EXHIBIT B TO AFFIDAVIT OF FURTH

RECEIVED
DEC 2 1976
FURTH, FAHRNER & MORS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

NEW VIRGINIA SQUIRES,
A Virginia Limited Partnership,

Plaintiff,

v.

NATIONAL BASKETBALL ASSOCIATION,
A Joint Venture
c/o Mr. Lawrence F. O'Brien
Two Pennsylvania Plaza
New York, New York 10001;

AMERICAN BASKETBALL ASSOCIATION,
A Delaware Corporation,
c/o Mr. David DeBusschere
1700 Broadway
New York, New York 10019

COLUMBIA BROADCASTING SYSTEM, INC.,
A New York Corporation,
c/o Mr. Robert Wussler, President
51 West 52nd Street
New York, New York 10019

CBS, INC.
A New York Corporation,
c/o Mr. John D. Backe
51 West 52nd Street
New York, New York 10019

BOSTON CELTICS BASKETBALL, INC.,
A Massachusetts Corporation,
c/o Mr. Irving Levin
Boston Garden
North Station
Boston, Massachusetts 02114;

BUFFALO BRAVES, INC.,
A New York Corporation,
c/o Mr. Paul Snyder
Buffalo Memorial Auditorium
Buffalo, New York 14202;

CHICAGO PROFESSIONAL BASKETBALL CORPORATION,
An Illinois Corporation,
c/o Mr. Philip Klutznick
333 North Michigan Avenue
Chicago, Illinois 60601;

EXHIBIT B

EXHIBIT B TO AFFIDAVIT OF FURTH

CHICAGO PROFESSIONAL SPORTS CORPORATION,
An Illinois Corporation,
c/o Mr. Philip Klutznick
333 North Michigan Avenue
Chicago, Illinois 60601;

CLEVELAND PROFESSIONAL BASKETBALL COMPANY
An Ohio Corporation,
c/o Mr. Nick Mileti
The Coliseum
2923 Streetsboro Road
Richfield Township, Ohio 44286;

CLEVELAND PROFESSIONAL BASKETBALL COMPANY, INC.
An Ohio Corporation,
c/o Mr. Nick Mileti
The Coliseum
2923 Streetsboro Road
Richfield Township, Ohio 44286;

DETROIT PISTONS BASKETBALL COMPANY
a Limited Partnership
c/o Mr. William M. Davidson
Suite 3000 Cobo Hall
Detroit, Michigan 48226;

DETROIT PROFESSIONAL BASKETBALL CLUB,
A Division of Zollner Corporation,
An Indiana Corporation,
c/o Mr. William Davidson
One Washington Boulevard
Detroit, Michigan 48226;

SAN FRANCISCO WARRIORS
A Limited Partnership
c/o Mr. Franklin Mieuli
556 Golden Gate Avenue
San Francisco, California 94102;

LEMAT CORPORATION,
The General Partner of a
Limited Partnership d/b/a
GOLDEN STATE WARRIORS
c/o Mr. Franklin Mieuli
556 Golden Gate Avenue
San Francisco, California 94102;

TEXAS SPORTS INVESTMENTS, INC.,
A Texas Corporation,
c/o Mr. Ray Patterson
3939 Kirby Drive, Suite 165
Houston, Texas 77006;

TEXAS PRO SPORTS, INC.
A Texas Corporation
c/o Mr. Ray Patterson
The Summit
Houston, Texas 77006;

KINGS PRO BASKETBALL, INC.,
A Missouri Corporation,
c/o Mr. H. Paul Rosenberg
Kemper Arena
1700 Wyoming Street
Kansas City, Missouri 64102;

KINGS PROFESSIONAL BASKETBALL CLUB, INC.,
A Missouri Corporation
c/o Mr. H. Paul Rosenberg
1800 Genessee
Kansas City, Missouri 64102;

ATLANTA HAWKS BASKETBALL, INC.,
A Georgia Corporation,
c/o Mr. Bud Seretean
100 Techwood Drive
Atlanta, Georgia 30303;

HAWKS PROFESSIONAL BASKETBALL, INC.
a Georgia Corporation,
c/o Mr. Bud Seretean
100 Techwood Drive
Atlanta, Georgia 30303;

CALIFORNIA SPORTS INCORPORATED,
A California Corporation,
c/o Mr. John Kent Cooke
3900 Manchester Blvd.
The Forum
P. O. Box 10
Inglewood, California 90306;

MILWAUKEE PROFESSIONAL SPORTS & SERVICES, INC.,
A Wisconsin Corporation,
c/o Mr. William Alverson
901 North Fourth Street
Milwaukee, Wisconsin 53203;

NEW ORLEANS BASKETBALL CLUB
A Limited Partnership
c/o Mr. Sam Battestone
Braniff Place Hotel
1500 Canal Street
New Orleans, Louisiana 70104;

EXHIBIT B TO AFFIDAVIT OF FURTH

MADISON SQUARE GARDEN CORP. AND
MADISON SQUARE GARDEN, INC.,
A Michigan Corporation,
c/o Mr. Michael Burke
Madison Square Garden Center
Four Pennsylvania Plaza
New York, New York 10001;

MADISON SQUARE GARDEN CENTER, INC.
c/o Mr. Michael Burke
Madison Square Garden Center
Four Pennsylvania Plaza
New York, New York 10001;

RIKO ENTERPRISES, INC.,
A Pennsylvania Corporation,
c/o Mr. Irv Kosloff
The Spectrum
Philadelphia, Pennsylvania 19148;

PHILADELPHIA 76ERS BASKETBALL CLUB, INC.
a Pennsylvania Corporation,
c/o Mr. Irv Kosloff
The Spectrum
Philadelphia, Pennsylvania 19148;

THE PHOENIX PROFESSIONAL BASKETBALL CLUB,
A Limited Partnership,
c/o Mr. Richard L. Bloch
P. O. Box 1369
Phoenix, Arizona 85001;

PRO BASKETBALL, INC.,
An Oregon Corporation
c/o Mr. Lawrence Weinberg
380 Lloyd Building
700 N.E. Multnomah Street
Portland, Oregon 97232;

SEATTLE SUPERSONICS CORPORATION,
A Washington Corporation,
c/o Mr. Samuel Schulman
221 West Harrison Street
Seattle, Washington 98119;

CAPITOL BULLETS BASKETBALL CLUB, INC.,
A Maryland Corporation,
c/o Mr. Abe Pollin
Capital Center
One Harry S. Truman Drive
Landover, Maryland 27086;

DENVER NUGGETS BASKETBALL, LTD.,
A Limited Partnership
c/o Mr. Carl Scheer
P. O. Box 4286
Denver, Colorado 80204;

EXHIBIT B TO AFFIDAVIT OF FURTH

DENVER NUGGETS, INC.,
A Colorado Corporation
c/o Mr. Carl Scheer
P. O. Box 4286
Denver, Colorado 80204;

SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P.
a Limited Partnership,
c/o Mr. Ozzie Silna
7 Capital Drive
Moonachie, New Jersey 07074

MUNCHAK CORPORATION,
A Delaware Corporation,
General Partner of Spirits of St. Louis,
L.P., A Limited Partnership,
c/o Mr. Ozzie Silna
7 Capital Drive
Moonachie, New Jersey 07074;

INDIANA PROFESSIONAL SPORTS, INC.,
An Indiana Corporation,
c/o Mr. W. D. Eason
6535 East 82nd Street
Indianapolis, Indiana 46250;

ARENA SPORTS, INC.,
An Indiana Corporation,
c/o Mr. W. D. Eason
6535 East 82nd Street
Indianapolis, Indiana 46250;

LONG ISLAND SPORTS ENTERPRISES, INC.,
A New York Corporation
c/o Mr. Roy Boe
One Landmark Square
Stamford, Connecticut 06901;

LONG ISLAND SPORTS,
A Limited Partnership,
c/o Mr. Roy Boe
One Landmark Square
Stamford, Connecticut 06901;

SAN ANTONIO BASKETBALL, LTD.,
A Limited Partnership,
c/o Mr. Angelo Drossos
1465 Frost Bank Tower
100 West Houston Street
San Antonio, Texas 78205;

KENTUCKY COLONELS, LTD.,
a Limited Partnership,
c/o Mr. John Y. Brown, Jr.
1302 Clear Springs Trace
Louisville, Kentucky 40223,

Defendants.

EXHIBIT B TO AFFIDAVIT OF FURTH

COMPLAINT

THE PARTIES

1. Plaintiff, the New Virginia Squires, (herein "Virginia") is a Virginia limited partnership which was organized on or about July 1, 1974, for the purpose of owning and operating a major league professional basketball franchise in the American Basketball Association. Its general partner is Tidewater Professional Basketball, Inc., a Virginia corporation.

2. Defendant, American Basketball Association (herein "ABA") is a Delaware not-for-profit corporation which was organized on January 1, 1967, for the purpose of engaging in major league professional basketball. Since its formation, the membership in the ABA has varied from six to eleven member teams at various points in time.

3. The owners of ABA franchises involved in the acts complained of herein and their predecessors in interest, other than Virginia, are also defendants in this action (herein "ABA teams" or "Member Clubs"). The named owners of ABA teams, the name of their teams and their principal places of business are as follows:

Member ABA Teams	Team Name	Principal Place of Business
Denver Nuggets, Inc. a Colorado corporation	Denver Nuggets	Denver, Colorado
Arena Sports, Inc. an Indiana corporation	Indiana Pacers	Indianapolis, Indiana
Spirits of St. Louis Basketball Club, L.P	Spirits of St. Louis	St. Louis, Missouri
Kentucky Colonels, Ltd. a limited partnership	Kentucky Colonels	Louisville, Kentucky
Long Island Sports, a limited partnership	New York Nets	Uniondale, New York
San Antonio Basketball, Ltd. a limited partnership	San Antonio Spurs	San Antonio, Texas

EXHIBIT B TO AFFIDAVIT OF FURTH

The ABA and the ABA teams shall be referred to collectively as the "ABA defendants."

4. Defendant, National Basketball Association (herein "NBA") is a joint venture among professional basketball teams which was founded over twenty-five (25) years ago as the result of the merger or consolidation of the Basketball Association of America and the National Basketball League. Since 1949, the NBA has had from 8 to 18 teams.

5. Also named as defendants in this action are the 22 current owners of NBA franchises (herein "NBA teams" or "Member Teams") and their predecessors in interest. Each of the NBA teams currently holds a franchise issued by the NBA. The named owners of the NBA teams, except those four teams formerly with the ABA, the names of their teams and their principal places of business are as follows:

Member Defendants	Team Name	Principal Place of Business
California Sports, Incorporated a California corporation	Los Angeles Lakers	Los Angeles, California
Lemat Corporation, a Delaware corporation, the general partner of limited partnership d/b/a Golden State Warriors	Golden State Warriors	San Francisco California
Pro Basketball, Inc., an Oregon corporation	Portland Trail Blazers	Portland, Oregon
Seattle Supersonics Corporation, a Washington corporation; First Northwest Industries of America, Inc., a Washington corporation	Seattle Supersonics	Seattle, Washington
The Phoenix Professional Basketball Club a limited partnership	Phoenix Suns	Phoenix, Arizona
Milwaukee Professional Sports and Services, Inc., a Wisconsin corporation	Milwaukee Bucks	Milwaukee, Wisconsin
Chicago Professional Basketball Corporation, an Illinois corporation	Chicago Bulls	Chicago, Illinois

Kings Pro Basketball, Inc., a Missouri corporation	Kansas City Omaha Kings	Kansas City, Missouri
Boston Celtics Basketball Club, Inc., a Massachusetts corporation	Boston Celtics	Boston, Massachusetts
Madison Square Garden Corp. and Madison Square Center, Inc. a Michigan corporation	New York Knickerbockers	New York, New York
Riko Enterprises, Inc., a Pennsylvania corporation	Philadelphia 76ers	Philadelphia Pennsylvania
Buffalo Braves, Inc., a New York corporation	Buffalo Braves	Buffalo, New York
Detroit Pistons Basketball Club, a division of Zollner Corporation, an Indiana corporation	Detroit Pistons	Detroit, Michigan
Capital Bullets Basketball Club, Inc., a Maryland corporation	Capital Bullets	Largo, Maryland
Atlanta Hawks Basketball, Inc., a Georgia corporation	Atlanta Hawks	Atlanta, Georgia
Texas Sports Investment, Inc. a Texas corporation	Houston Rockets	Houston, Texas
Cleveland Professional Basketball Company, Inc. an Ohio corporation	Cleveland Cavaliers	Cleveland, Ohio
New Orleans Basketball Club, a limited partnership	New Orleans Jazz	New Orleans, Louisiana

The NBA and the owners of the NBA franchises during the period in question shall be referred to collectively as the "NBA defendants."

5.5 Where any corporation, partnership or other entity owning an ABA or NBA team or franchise is referred to or named specifically as a defendant in the above lists or in the body of this complaint, such reference is deemed to include any and all predecessors and successors in interest which owned the team during the relevant time period or at present.

6. Columbia Broadcasting Systems, Inc. or CBS, inc. (herein, "CBS"), a New York corporation, is one of the three major national television network companies. CBS owns, directly or through a subsidiary, several VHF television stations which it operates under licenses granted by the Federal Communications Commission. CBS also operates a national television network, which provides programs for broadcast by television stations owned by others.

NATURE OF TRADE AND COMMERCE

7. Major league professional basketball is conducted by and through teams operated throughout the United States to provide the general public with highly-skilled exhibitions of the game of basketball. To operate successfully, each of such teams generally require, among other things:

(a) Membership in a league in which the member teams making up such league are of such number and skill as to maintain interest on the part of the public;

(b) The sale of television and radio rights, both to stations located within such teams' playing area and to national television networks for broadcasting throughout the United States;

(c) Membership in a league which has viability and continuity of enterprise in the eyes of the public;

8. The loss of any team in a league jeopardizes and damages the success and operations of both the league and its individual members as do published discussions and reports by league and team officials regarding the demise of the league, either due to merger, financial failure or the public attempts by Member Clubs to join rival leagues.

9. Major league professional basketball involves the organizing, promoting and holding of major league professional basketball games, including preseason exhibition games, regularly scheduled season games, an "all-star game" and "play-off games" to determine the annual winner in conferences or divisions of a league and to determine the overall champion of the league; the staging of such games in suitable arenas or other places; the sale of tickets of admission; the negotiation and sale of rights to broadcast and rebroadcast such games over television and radio facilities in interstate commerce and the negotiation for, acquisition and retention of highly skilled and well known players, coaches and other personnel.

10. Major league professional basketball constitutes a market separate and distinct from the exhibition of minor league or other professional, collegiate, or high school basketball contests and other sporting events, forms of public shows, spectacles and entertainment. It is the only class of professional basketball which attracts widespread public interest, which is regularly publicized in the sporting pages of newspapers and magazines and which attracts national and local network television and radio sponsorship. Major league professional basketball has a particular demand and particular qualities differing from college basketball. The college and professional rules of play differ in many respects, and entirely separate records and statistics are maintained for professional as opposed to college basketball. The caliber of both individual and team play of major league professional basketball generally is far superior to that of college basketball. Each year, only a relatively small number of the most outstanding college players are able to obtain positions on major league professional basketball teams.

11. Member NBA teams, and up until the 1976-77 season Member ABA teams, schedule basketball games in various cities and, in order to perform such schedules, the defendants are regularly required to transport their players, coaches and other personnel across state lines and to make frequent use of the mails and other means of interstate communication. Admission tickets to defendants' games are sold through the mails to customers located in states other than those states in which the games are played. A substantial number of people cross state lines to be present at such games. The major league professional basketball season begins in October and lasts continuously through April or May of each year. During the 1975-76 season, hundreds of games were played in dozens of cities by ABA and NBA defendants, and attendance at NBA exhibition, regular season and play-off games and attendance at ABA regular season and play-off games totalled millions of persons.

12. The NBA and its member teams have an agreement, the exact terms of which are unknown to the Plaintiff, with defendant CBS, which provides for national network television coverage of basketball games between Member NBA teams. In addition, NBA defendants have agreements with various television and radio stations which provide for the broadcasting of each of such teams' games on a local or regional basis. The broadcasting made pursuant to such agreements are often made by stations located in a state other than the one in which the game so transmitted is being played and, in many instances, the transmission is heard or seen by persons who are outside of the state in which the transmitting station is located.

COUNT ONE

(Against All Defendants For Damages Under
the Sherman Anti-Trust Law for Restraint of Trade)

I.

NATURE OF CLAIM AND JURISDICTION OF COURT

13. Original jurisdiction in this Court exists under 28 U.S.C. § 1337 and 15 U.S.C. § 15.

14. This action is brought against all of the above-named defendants under Section 4 of the Clayton Act (15 U.S.C. § 15) to recover threefold the damages sustained by the plaintiff due to violations of Section 1 of the Sherman Act (15 U.S.C. § 1).

15. This cause of action arose from the defendants' transacting business in Virginia, and from their causing tortious injury in Virginia by acts and omissions outside Virginia, while regularly doing business, engaging in other persistent courses of conduct, and/or deriving substantial revenue from services rendered in Virginia; therefore, the defendants are within the jurisdiction of this Court for the purpose of service under §8-81.2(a)(1) and (4) of the Code of Virginia, Rule 4(e) of the Federal Rules of Civil Procedure, and 15 U.S.C. §22.

16. Each of the above-named defendants transacts business in this district, and venue is therefore proper in this Court under § 11 of the Clayton Act (15 U.S.C. §22) and 28 U.S.C. §1391.

II.

OFFENSES CHARGED

17. Since July 1, 1974, and continuing up to and including the date of the filing of this Complaint, defendants and their unnamed co-conspirators have been engaged in combination and conspiracy in unreasonable restraint of the above-described interstate trade and

commerce of major league professional basketball, all in violation of § 1 of the Sherman Act (15 U.S.C. §1).

18. The aforesaid combination and conspiracy has consisted of a continuing understanding and concert of action among the defendants and their co-conspirators the intent and substantial result of which has been to eliminate Virginia as a competitor in major league professional basketball in the United States.

III.

ACTS OF DEFENDANTS

19. In furtherance of the aforesaid combination, conspiracy and concert of action, the defendants and each of them, and their co-conspirators have acted, and do act, to eliminate Virginia as a competitor as follows:

(a) Defendant CBS negotiated a new television contract with the NBA in the Spring of 1976 which provided for a substantial increase in payments by CBS to the NBA if four additional teams were added to that league, and through this financial inducement, sought and/or encouraged a merger or consolidation between the NBA and the ABA which would and did exclude Virginia and therefore effectively eliminated Virginia from the trade and commerce of major league professional basketball.

(b) The ABA defendants encouraged Virginia to continue operations at tremendous losses throughout the 1975-76 playing season for the good of the league with the understanding that Virginia would have an equal opportunity to participate in a merger or consolidation with the NBA while in fact the ABA defendants had eliminated Virginia from consideration as a possible participant in any merger and knew that the ABA could no longer continue operations as a separate league, which course of conduct effectively

eliminated Virginia from the trade and commerce of major league professional basketball.

(c) Prior to and during merger negotiations, the ABA defendants and NBA defendants had eliminated Virginia from consideration as a possible participant in merger plans and through public statements, press releases and other published reports regarding merger, publicized this fact throughout the country with the result that the basketball public and potential investors in Virginia could see no future for the ABA in professional basketball and no future for Virginia in a merged league, which course of conduct effectively eliminated Virginia from the trade and commerce of major league professional basketball.

(d) The ABA defendants and NBA defendants sought and negotiated a merger or consolidation between the two leagues, which would and did exclude Virginia and which therefore effectively eliminated Virginia from the trade and commerce of major league professional basketball.

(e) On September 15, 1976, the merger or consolidation sought by each of the defendants was consummated and Virginia was excluded.

(f) The ABA has ceased to operate as a functioning league, and Virginia has been eliminated from the trade and commerce of major league professional basketball.

IV.

EFFECTS OF OFFENSES

20. The above-enumerated offenses and wrongful and anticompetitive acts by defendants and their co-conspirators have had the following effects, among others:

(a) the number of teams participating in major league professional basketball and offering to the public exhibitions in that trade and commerce have been intentionally reduced, therefore suppressing and eliminating sources of competition between teams;

(b) the ABA, the only existing competitor to the NBA in major league professional basketball has been merged or consolidated with the NBA so it is no longer a viable competitior, therefore suppressing and eliminating competition between leagues;

(c) the reduction in the number of teams and leagues has suppressed and eliminated competition in the field of network television exhibitions of major league professional basketball;

(d) the public generally and the plaintiff specifically have been denied the benefits of free competition in major league professional basketball at the team, league, and television exhibition levels;

(e) Virginia and its business and property have been proximately damaged through, inter alia:

(1) loss of profits due to loss of sales during the operation of the franchise;

(2) loss of profits due to increased costs during the operation of the franchise;

(3) loss of future profits from being denied participation in the merged league;

(4) destruction of the business, goodwill and other intangible assets of the plaintiff; and

(5) losses occasioned by the inability to continue to solicit and raise funds from new investment sources due to the financial climate created by the defendants;

(f) the franchise held by Virginia has been rendered valueless because the league in which it had previously participated, the right to which participation had been purchased in good faith for a substantial consideration and maintained at great expense to the plaintiff, has been merged or consolidated into the NBA and Virginia was excluded from this merger or consolidation with the result that there no longer remains a viable league in which it may participate.

WHEREFORE, the plaintiff prays that this Court ADJUDGE, ORDER and DECREE:

(a) That the defendants have violated § 1 of the Sherman Act.

(b) That the plaintiff be awarded damages in the amount of Five Million Dollars ($5,000,000.00), and that the defendants pay to the plaintiff threefold the damages sustained by plaintiff as provided by law, or the amount of Fifteen Million Dollars ($15,000,000.00), together with the costs and attorneys' fees incurred herein.

(c) That the plaintiff be given such other and further relief as the Court may deem just and proper.

COUNT TWO

(Against All Defendants For Damages Under the Sherman Anti-Trust Law for Monopolization, Attempted Monopolization and Conspiracy to Monopolize)

I.

NATURE OF CLAIM AND JURISDICTION OF COURT

21. Original jurisdiction in this Court exists under 28 U.S.C. § 1337 and 15 U.S.C. § 15.

22. This action is brought against all of the above-named defendants under Section 4 of the Clayton Act (15 U.S.C. § 15) to recover threefold the damages sustained by the plaintiff due to violations of Section 2 of the Sherman Act (15 U.S.C. § 2).

23. This cause of action arose from the defendants' transacting business in Virginia, and from their causing tortious injury in Virginia by acts and omissions outside Virginia, while regularly doing business, engaging in other persistent courses of conduct, and/or deriving substantial revenue from services rendered in Virginia; therefore, the defendants are within the jurisdiction of this Court for the purpose of service under § 8-81.21(a)(1) and (4) of the Code of Virginia, Rule 4(e) of the Federal Rules of Civil Procedure, and 15 U.S.C. § 22.

24. Each of the above-named defendants transacts business in this district, and venue is therefore proper in this Court under § 11 of the Clayton Act (15 U.S.C. § 22) and 28 U.S.C. § 1391.

II.

OFFENSES CHARGED

25. Defendants have monopolized and attempted to monopolize and conspired to monopolize the trade and commerce of major league professional basketball, as described above, in the relevant market consisting of the United States, all in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

26. The aforesaid monopolization, attempted monopolization and conspiracy to monopolize has consisted of actions taken by individual defendants, as well as a continuing understanding and concert of action among the various defendants and their co-conspirators, the intent and substantial result of all of which actions has been to eliminate Virginia as a competitor in major league professional basketball in the United States, and to secure for the defendants a monopoly in that trade and commerce.

III.

ACTS OF DEFENDANTS

27. In furtherance of the aforesaid monopolization, attempt to monopolize and conspiracy to monopolize, the defendants and each of them, and their co-conspirators have acted to eliminate Virginia as a competitor and to monopolize major league professional basketball as follows:

(a) Defendant CBS negotiated a new television contract with the NBA in the Spring of 1976 which provided for a substantial increase in payments by CBS to the NBA if four additional teams were added to that league and through this financial inducement, sought and/or encouraged a merger or consolidation between the NBA and the ABA which would and did exclude Virginia and therefore effectively eliminated Virginia from the trade and commerce of major league professional basketball and gave CBS a monopoly in the field of network television exhibitions of major league professional basketball.

(b) The ABA defendants encouraged Virginia to continue operations at tremendous losses throughout the 1975-76 playing season for the good of the league with the understanding that Virginia would have an equal opportunity to participate in a merger or consolidation with the NBA, while in fact the ABA defendants had eliminated Virginia from consideration as a possible

participant in any merger and knew that the ABA could no longer continue operations as a separate league, which course of conduct effectively eliminated Virginia from the trade and commerce of major league professional basketball and which gave the ABA, as part of the merged or consolidated entity, or those member teams absorbed by the NBA, a monopoly in major league professional basketball.

(c) Prior to and during merger negotiations, the ABA defendants and NBA defendants had eliminated Virginia from consideration as a possible participant in merger plans and through public statements, press releases and other published reports regarding merger, publicized this fact throughout the country with the result that the basketball public and potential investors in Virginia could see no future for the ABA in professional basketball and no future for Virginia in a merged league, which course of conduct effectively eliminated Virginia from the trade and commerce of major league professional basketball and gave the NBA defendants and ABA defendants a monopoly in major league professional basketball.

(d) The ABA defendants and NBA defendants sought and negotiated a merger or consolidation between the two leagues, which would and did exclude Virginia and which therefore effectively eliminated Virginia from the trade and commerce of major league professional basketball and gave the NBA defendants and ABA defendants a monopoly in major league professional basketball.

(e) On September 15, 1976, the merger or consolidation sought by each of the defendants was consummated and Virginia was excluded.

(f) The ABA has ceased to operate as a functioning league, with the result that the NBA has secured for itself a monopoly in major league professional basketball, the Member Clubs of the ABA other than

Virginia now participate in that monopoly, CBS has secured for itself a monopoly in the field of network television exhibitions of major league professional basketball and Virginia has been effectively eliminated from the trade and commerce of major league professional basketball.

IV.

EFFECTS OF OFFENSES

28. The above-enumerated offenses and wrongful and anticompetitive acts by defendants and their co-conspirators have had the following effects, among others:

(a) The defendants have monopolized, attempted to monopolize and conspired to monopolize major league professional basketball;

(b) The ABA, the only existing competitor to the NBA in major league professional basketball has been merged or consolidated into the NBA so it is no longer a viable competitor, thereby creating an effective monopoly for the NBA in that trade and commerce:

(c) Defendant CBS, by aiding, abetting and encouraging the elimination of the ABA as a competitor to the NBA, has secured for itself a virtual monopoly in the field of broadcasting of major league professional basketball contests at the network level;

(d) The public generally and the plaintiff specifically have been denied the benefits of free competition in major league professional basketball at the team, league and television levels, and will be subjected to a monopoly in that trade and commerce;

(e) Virginia and its business and property have been proximately damaged through, inter alia:

(1) loss of profits due to loss of sales during the operation of the franchise;

(2) loss of profits due to increased costs during the operation of the franchise;

(3) loss of future profits from being denied participation in the merged league;

(4) destruction of the business, goodwill and other intangible assets of the plaintiff; and

(5) losses occasioned by the inability to continue to solicit and raise funds from new investment sources due to the financial climate created by the defendants.

(f) The franchise held by Virginia has been rendered valueless because the league in which it had previously participated, the right to which participation had been purchased in good faith for a substantial consideration and maintained at great expense to the plaintiff, has been merged or consolidated into the NBA and Virginia has been excluded from this merger or consolidation with the result that there no longer remains a viable league in which it might participate.

WHEREFORE, the plaintiff prays that this Court ADJUDGE, ORDER and DECREE:

(a) That the defendants have violated Section 2 of the Sherman Act.

(b) That the plaintiff be awarded damages in the amount of Five Million Dollars ($5,000,000.00), and that the defendants pay to the plaintiff threefold the damages sustained by plaintiff as provided by law, or the amount of Fifteen Million Dollars ($15,000,000.00), together with the costs and attorneys' fees incurred herein.

(c) That the plaintiff be given such other and further relief as the Court may deem just and proper.

COUNT THREE

(Against All Defendants For Damages Under the Virginia Anti-Trust Act For Restraint of Trade)

I.

NATURE OF CLAIM AND JURISDICTION OF COURT

29. Jurisdiction in this Court exists under 28 U.S.C. § 1332 and this Court's pendent jurisdiction.

30. This action is brought against all of the above-named defendants under Section 59.1-9.12 of the Code of Virginia to recover threefold the damages sustained by the plaintiff due to violations of Section 59.1-9.5 of the Code of Virginia.

31. This cause of action arose from the defendants' transacting business in Virginia, and from their causing tortious injury in Virginia by acts and omissions outside Virginia, while regularly doing business, engaging in other persistent courses of conduct, and/or deriving substantial revenue from services rendered in Virginia, and the defendants are therefore within the jurisdiction of this Court for the purpose of service under §8-81.2(a)(1) and (4) of the Code of Virginia and Rule 4(e) of the Federal Rules of Civil Procedure.

32. Each of the above-named defendants regularly and systematically conducts affairs and business activity in the City of Norfolk, Virginia, and venue is therefore proper in this Court under § 59.1-9.9 of the Code of Virginia.

II.

OFFENSES CHARGED

33. The plaintiff realleges paragraphs 17 and 18 of Count I.

III.

ACTS OF DEFENDANTS

34. The plaintiff realleges paragraph 19 of Count I.

35. The above-alleged violations are willful and flagrant.

IV.

EFFECTS OF OFFENSES

36. The plaintiff realleges paragraph 20 of Count I.

WHEREFORE, plaintiff prays that this Court ORDER, ADJUDGE and DECREE:

(a) That the defendants have willfully and flagrantly violated Section 59.1-9.5 of the Code of Virginia.

(b) That the plaintiff be awarded damages in the amount of Five Million Dollars ($5,000,000.00), and that the defendants pay to the plaintiff threefold the damages sustained by plaintiff as provided by law, or the amount of Fifteen Million Dollars ($15,000,000.00), together with the costs and attorneys' fees incurred herein.

(c) That the plaintiff be given such other and further relief as the Court may deem just and proper.

COUNT FOUR

(Against All Defendants For Damages Under
the Virginia Anti-Trust Act for Monopolization
Attempted Monopolization and Conspiracy to Monopolize)

I.

NATURE OF CLAIM AND JURISDICTION OF COURT

37. Jurisdiction in this Court exists under 28 U.S.C. §1332 and this Court's pendent jurisdiction.

38. This action is brought against all of the above-named defendants under Section 59.1-9.12 of the Code of Virginia to recover threefold the damages sustained by the plaintiff due to violations of Section 59.1-9.6 of the Code of Virginia.

39. This cause of action arose from the defendants' transacting business in Virginia, and from their causing tortious injury in Virginia by acts and omissions outside Virginia, while regularly doing business, engaging in other persistent courses of conduct, and/or deriving substantial revenue from services rendered in Virginia, and the defendants are therefore within the jurisdiction of this Court for the purpose of service under § 8-81.2(a)(1) and (4) of the Code of Virginia and Rule 4(e) of the Federal Rules of Civil Procedure.

40. Each of the above-named defendants regularly and systematically conducts affairs and business activity in the City of Norfolk, Virginia, and venue is therefore proper in this Court under § 59.1-9.9 of the Code of Virginia.

II.

OFFENSES CHARGED

41. The plaintiff realleges paragraphs 25 and 26 of Count II.

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III.

ACTS OF DEFENDANTS

42. The plaintiff realleges paragraph 27 of Count II.

43. The above-alleged violations are willful and flagrant.

IV.

EFFECTS OF OFFENSES

44. The plaintiff realleges paragraph 28 of Count II.

WHEREFORE, the plaintiff prays that this Court ADJUDGE, ORDER and DECREE:

(a) That the defendants have willfully and flagrantly violated Section 59.1-9.6 of the Code of Virginia.

(b) That the plaintiff be awarded damages in the amount of Five Million Dollars ($5,000,000.00), and that the defendants pay to the plaintiff threefold the damages sustained by plaintiff as provided by law, or the amount of Fifteen Million Dollars ($15,000,000.00), together with the costs and attorneys' fees incurred herein.

(c) That the plaintiff be given such other and further relief as the Court may deem just and proper.

COUNT FIVE

(Against the ABA Defendants
For Damages for Breach of Contract)

I.

NATURE OF CLAIM AND JURISDICTION OF COURT

45. Jurisdiction in this Court exists by virtue of the diversity of the parties under 28 U.S.C. § 1332 and this Court's pendent jurisdiction.

46. This action is brought against the ABA defendants to recover damages from the breach of a contractual obligation by the defendants as hereinafter alleged, the amount of which damages, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

47. This cause of action arose from the defendants' transacting business in Virginia, and contracting to supply services in Virginia, and the defendants are therefore within the jurisdiction of this Court for the purpose of service under Section 8-81.2(a)(1) and (2) of the Code of Virginia and Rule 4(e) of the Federal Rules of Civil Procedure.

II.

OFFENSES CHARGED AND ACTS OF DEFENDANTS

48. A contract existed between Virginia and the ABA defendants in the form of a "Franchise Agreement" executed by Virginia at the time it purchased the franchise from the ABA for valuable consideration (herein "Virginia Franchise Agreement") and under the terms of this agreement, Virginia was expressly guaranteed the right to participate equally in any consolidation or merger that might occur between the ABA and the NBA.

49. A contract existed between Virginia and the ABA defendants in the form of the Virginia Franchise Agreement executed by Virginia at the time the franchise was purchased and under the terms of this agreement, the

ABA defendants impliedly agreed that all teams would be treated equally and that the league would not be allowed to be destroyed for the benefit of some but not all of the participating teams.

50. In a meeting of the ABA trustees on February 24, 1976, the trustees agreed that if Virginia was denied participation in any merger or consolidation that might take place between the NBA and ABA, Virginia would be compensated by the ABA defendants through payment of the sum of Two Million Dollars ($2,000,000.00) in four equal installments with the first installment due upon any accommodation with the NBA and the remaining installments due over three years.

51. In addition, the trustees agreed that the players belonging to Virginia, upon any accommodation not including that franchise, would be assigned to the league.

52. During the winter and spring of 1976, representatives of the NBA and ABA defendants met from time to time and ultimately agreed that four teams from the ABA would be allowed to join the NBA under some form of merger or consolidation, the exact nature of which is not presently known to the plaintiff, and that Virginia would be excluded from that merger or consolidation.

53. The merger or consolidation negotiations were carried on by representatives from the ABA and certain ABA teams on behalf of the ABA who did not include any member of the Virginia organization, who were specifically appointed to comply with the request of the NBA, and who did not fairly represent the interests of Virginia as they were obligated to do under the express and implied terms of the Franchise Agreement.

54. On September 15, 1976, the merger or consolidation was consummated. Virginia has demanded both orally and in writing that it be paid as per the agreement of February 24, 1976, and the ABA defendants through their agents have refused to honor their obligation and have further declined to

take over the player contracts held by Virginia with the result that Virginia may remain liable on such outstanding player contracts while being excluded from the only league in which it could reasonably expect to use those players.

WHEREFORE, the plaintiff prays that this Court ADJUDGE, ORDER and DECREE:

(a) That the ABA defendants have breached the express and implied contracts represented by the Virginia Franchise Agreement.

(b) That the ABA defendants have breached the agreement consummated on February 24, 1976.

(c) That the plaintiff be awarded compensatory damages in the amount of Five Million Dollars ($5,000,000.00),

(d) That the plaintiff has such other and further relief as the Court may deem just and proper.

COUNT SIX

(Against CBS and the NBA Defendants for Tortious Interference With a Contract)

I.

NATURE OF CLAIM AND JURISDICTION OF COURT

55. Jurisdiction in this Court exists by virtue of the diversity of the parties under 28 U.S.C. § 1332 and this Court's pendent jurisdiction.

56. This action is brought against the NBA defendants and CBS to recover damages sustained by the plaintiff due to tortious interference with a contract by the defendants, the amount of which damages, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

57. This cause of action arose from the defendants' transacting business in Virginia and from their causing tortious injury in Virginia by acts and omissions outside Virginia while regularly doing business, engaging in persistent courses of conduct, and/or deriving substantial revenue from services rendered in Virginia, and the defendants are therefore within the jurisdiction of this Court for the purpose of service under § 8-81.2(a)(1) and (4) of the Code of Virginia and Rule 4(e) of the Federal Rules of Civil Procedure.

II.

OFFENSES CHARGED AND ACTS OF DEFENDANTS

58. A contract existed between Virginia and the ABA defendants in the form of the Virginia Franchise Agreement executed by Virginia at the time the franchise was purchased and under the terms of this agreement Virginia was expressly guaranteed the right to participate equally in any consolidation or merger that might transpire.

59. A contract existed between Virginia and the ABA defendants in the form of the Virginia Franchise Agreement executed by Virginia at the

time the franchise was purchased and under the terms of this agreement, the ABA defendants impliedly agreed that all teams would be treated equally and that the league would not be allowed to be destroyed for the benefit of some but not all of the participating teams.

60. Defendant CBS negotiated a new television contract with the NBA defendants in the spring of 1976 which provided for a substantial increase in payments by CBS to the NBA defendants if four additional teams were added to that league.

61. Following its receipt of the CBS offer, the NBA defendants made an offer to the ABA defendants to allow a maximum of four teams from the ABA to join the NBA through a merger or consolidation of the two leagues.

62. The financial inducement to the NBA defendants by CBS to extend such offer of consolidation or expansion and the offer of consolidation or expansion itself, while the NBA defendants and CBS were aware of the Virginia Franchise Agreement, constituted tortious interference with the contracts existing between Virginia and the ABA defendants, for the pecuniary advantage of CBS and the NBA defendants.

63. The failure of the ABA defendants through its agents and representatives to promote fairly and equally the interests of all teams which had purchased franchises therein, its failure to observe the explicit provision in Virginia's Franchise Agreement as to the equal participation of Virginia in any consolidation or merger and the general subjugation by the representatives of the ABA of the interests of the league as a whole to the interests of several of its teams constituted a breach of Virginia's Franchise Agreement which was induced by and was the direct result of tortious interference on the part of CBS and the NBA defendants in the form of financial and other inducements.

64. The intended and actual effect of the offenses heretofore alleged was and has been that the defendants have rendered valueless the ABA

franchise held by Virginia through the dissolution of the ABA and the destruction of its viability as an independent league by encouraging, planning and allowing a consolidation or merger with the NBA involving some of the ABA teams while at the same time, denying such participation to Virginia. This plan was consummated on September 15, 1976.

WHEREFORE, the plaintiffs pray that this Court ADJUDGE, ORDER and DECREE:

(a) That CBS and the NBA defendants have tortiously interfered with the express and implied contracts existing between Virginia and the ABA, embodied in the Franchise Agreement.

(b) That the plaintiff be awarded compensatory damages in the amount of Five Million Dollars ($5,000,000.00).

(c) That the plaintiff be awarded punitive damages in the amount of Five Million Dollars ($5,000,000.00).

(d) That the plaintiff have such other and further relief as the Court may deem just and proper.

COUNT SEVEN

(Against Four ABA Teams for Breach of Contract, Damages to Third-Party Beneficiary)

I.

NATURE OF CLAIM AND JURISDICTION OF COURT

65. Jurisdiction in this Court exists by virtue of the diversity of the parties under 28 U.S.C. § 1332 and this Court's pendent jurisdiction.

66. This action is brought against the following entities, and their respective predecessors or successors in interest: Denver Nuggets, Inc., a Colorado corporation; Long Island Sports, a limited partnership; San Antonio Basketball, Ltd., a Texas limited partnership; and Arena Sports, Inc., an Indiana corporation, for damages to Virginia resulting from the breach of contractual obligations by said defendants, the amount of which damages, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

67. This cause of action arose from the defendants' transacting business in Virginia and contracting to supply services in Virginia, and the defendants are therefore within the jurisdiction of this Court for the purpose of service under § 8-81.2(a)(1) and (2) of the Code of Virginia and Rule 4(e) of the Federal Rules of Civil Procedure.

II.

OFFENSES CHARGED AND ACTS OF DEFENDANTS

68. Section 8.5 of the By-laws of the ABA, which by-laws constitute a part of the contract between and among all the teams of the ABA and the ABA itself, provides that any member club withdrawing from the ABA in order to enter another professional basketball league without the unanimous consent of the trustees shall forfeit to the ABA all right, title and interest in its franchise and all player contracts. In addition, the withdrawing member

club shall be required to pay the ABA the sum of Two Million Dollars ($2,000,000.00) as liquidated damages and as additional liquidated damages, withdrawing member club shall forfeit its share of all monies held by the ABA for the member club as well as the proceeds of the letter of credit deposited by the club with the ABA.

69. The express and obvious purpose of this provision of the ABA By-laws is to prevent any single club or group of clubs from acting in a manner not consistent with the best interests of the league as a whole, to provide for the stability of the league as an ongoing business, and to protect all member clubs which have subordinated their individual interests to the best interests of the league, and Virginia was induced by and relied upon the existence of such protection both in making its initial investment (the purchase of the franchise) and in all subsequent financial sacrifices.

70. During the spring of 1976, the following four member clubs prepared to leave and subsequently did leave the ABA to join the NBA: the Denver Nuggets, the New York Nets, the San Antonio Spurs, and the Indiana Pacers. These teams are owned by the defendants enumerated above.

71. The four defendants named in this Count VII breached their contract with the ABA to which the plaintiff was a third-party beneficiary and as a result thereof, the business of Virginia was effectively destroyed when the ABA was deserted by the defendants.

WHEREFORE, the plaintiff prays that this Court ADJUDGE, ORDER and DECREE:

(a) That the defendants, Denver Nuggets, Inc., Long Island Sports, San Antonio Basketball, Ltd. and Arena Sports, Inc. have breached that part of their contract with the ABA as set forth in § 8.5 of the ABA By-laws.

(b) That the plaintiff be awarded compensatory damages of Five Million Dollars ($5,000,000.00) as a third-party beneficiary to each contract.

(c) That the plaintiff be given such other and further relief as the Court may deem just and proper.

EXHIBIT B TO AFFIDAVIT OF FURTH

COUNT EIGHT

(Against the ABA Defendants
For Damages Under the Virginia Retail Franchising Act)

I.

NATURE OF CLAIM AND JURISDICTION OF COURT

72. Jurisdiction in this Court exists under 28 U.S.C. § 1332 and this Court's pendent jurisdiction.

73. This action is brought against the ABA defendants under § 13.1-571 of the Code of Virginia to recover damages sustained by the plaintiff due to violations of § 13.1-564 of the Code of Virginia the amount of which damages, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

74. This cause of action arose from the defendants' transaction business in Virginia, and from their causing tortious injury in Virginia by acts and omissions outside Virginia, while regularly doing business, engaging in other persistent courses of conduct, and/or deriving substantial revenue from services rendered in Virginia and the defendants are therefore within the jurisdiction of this Court for the purpose of service under § 8-81.1(a)(1) and (4) of the Code of Virginia and Rule 4(e) of the Federal Rules of Civil Procedure.

II.

OFFENSES CHARGED AND ACTS OF DEFENDANTS

75. A contract existed between Virginia and the ABA in the form of the Virginia Franchise Agreement executed by Virginia at the time their franchise was purchased. Under the terms of its franchise agreement, Virginia was expressly guaranteed the right to participate equally with the other franchisee Member Clubs in the ABA in any merger or consolidation that might occur between the ABA and the NBA.

76. In addition, § 8.7 of the ABA's By-laws in effect at the time that the franchise was purchased set forth the terms and conditions under which the franchise could be terminated and the steps that would have to be taken legally to effect such a termination. These procedures had been agreed to by all ABA teams.

77. In May of 1976, the ABA defendants through their agents and representatives, purported to terminate the franchise of Virginia after it had completed the 1975-76 playing season in order to deny Virginia equal participation in the consolidation or merger between the ABA and the NBA, which action greatly damaged the interests of Virginia.

78. Virginia's franchise was terminated and cancelled in May of 1976, only one month prior to the announcement of the merger by the ABA and the ABA teams without reasonable cause and in violation of the By-laws of the ABA, the terms of Virginia's Franchise Agreement and the laws of the State of Virginia.

WHEREFORE, the plaintiff prays that this Court ADJUDGE, ORDER and DECREE:

(a) That the ABA defendants have violated § 13.1-564 of the Code of Virginia.

(b) That the plaintiff be awarded damages in the amount of Five Million Dollars ($5,000,000.00).

(c) That the plaintiff be given such other and further relief as the Court may deem just and proper.

EXHIBIT B TO AFFIDAVIT OF FURTH

COUNT NINE

(Against the ABA Defendants and the NBA Defendants
For Damages to Plaintiffs' Business
Resulting from a Combination by the Defendants)

I.

NATURE OF CLAIM AND JURISDICTION OF COURT

79. Jurisdiction in this Court exists by virtue of the diversity of the parties under 28 U.S.C. § 1332 and this Court's pendent jurisdiction.

80. This action is brought against the ABA defendants and the NBA defendants under § 18.2-500 of the Code of Virginia to recover threefold the damages sustained by plaintiff due to violations of § 18.2-499 of the Code of Virginia, the amount of which damages, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

81. This cause of action arose from the defendants' transacting business in Virginia, and from their causing tortious injury in Virginia by acts and omissions outside Virginia, while regularly doing business, engaging in other persistent courses of conduct, and/or deriving substantial revenue from services rendered in Virginia, and the defendants are therefore within the jurisdiction of this Court for the purpose of service under § 8-81.1(a)(1) and (4) of the Code of Virginia and Rule 4(e) of the Federal Rules of Civil Procedure.

II.

OFFENSES CHARGED AND ACTS OF DEFENDANTS

82. The plaintiff realleges paragraphs 17 through 20 of Count I and paragraphs 25 through 28 of Count II.

83. The defendants, or any of them, in various combinations, combined, associated, agreed, mutually undertook and concerted together for the purpose of willfully and maliciously injuring plaintiff in its reputation,

trade, business and profession by the above means in violation of § 18.2-499 of the Code of Virginia.

84. The plaintiff was injured in its reputation, trade, business and profession of the above-mentioned acts of defendants.

WHEREFORE, the plaintiff prays that this Court ADJUDGE, ORDER and DECREE:

(a) That the defendants have violated § 18.2-499 of the Code of Virginia.

(b) That the plaintiff be awarded damages in the amount of Five Million Dollars ($5,000,000.00), and that the defendants pay to the plaintiff threefold the damages sustained by plaintiff as provided by law, or the amount of Fifteen Million Dollars ($15,000,000.00), together with the costs and attorneys' fees incurred herein.

(c) That the plaintiff be given such other and further relief as the Court may deem just and proper.

EXHIBIT B TO AFFIDAVIT OF FURTH

COUNT TEN

(Against Four ABA Teams
For Breach of Fiduciary Duty)

I.

NATURE OF CLAIM AND JURISDICTION OF COURT

85. Jurisdiction in this Court exists by virtue of the diversity of the parties under 28 U.S.C. § 1332 and this Court's pendent jurisdiction.

86. This action is brought against the following entities, and their respective predecessors or successors in interest: Denver Nuggets, Inc., a Colorado corporation; Long Island Sports, a limited partnership; San Antonio Basketball, Ltd., a Texas limited partnership; and Arena Sports, Inc., an Indiana corporation, for damages to Virginia resulting from the breach of fiduciary obligations by said defendants, the amount of which damages, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

87. This cause of action arose from the defendants' transacting business in Virginia and contracting to supply services in Virginia, and the defendants are therefore within the jurisdiction of this Court for the purpose of service under § 8-81.2(a)(1) and (2) of the Code of Virginia and Rule 4(e) of the Federal Rules of Civil Procedure.

II.

OFFENSES CHARGED AND ACTS OF DEFENDANTS

88. The express and obvious purpose of the By-laws of the ABA is to prevent any single club or group of clubs from acting in a manner not consistent with the best interests of the league as a whole, to provide for the stability of the league as an ongoing business, and to protect those other clubs which have subordinated their individual interests to the best interests of the league.

89. During the spring of 1976, the following four Member Clubs prepared to leave and subsequently did leave the ABA to join the NBA: the Denver Nuggets, the New York Nets, the San Antonio Spurs and the Indiana Pacers. These teams are owned by the defendants enumerated above.

90. Representatives from the four defendant organizations, negotiating on behalf of the ABA as a whole, owed a fiduciary duty to the ABA and the other Member Clubs to fairly represent those parties, and to subordinate their own interests to those of the ABA and the other Member Clubs where any conflict arose.

91. While negotiating nominally on behalf of the ABA as a whole, representatives from the defendants actually were promoting their own best interests and subordinating to those interests the future of both the ABA and other Member Clubs.

92. The representatives of the four defendants breached their fiduciary obligation owed to the ABA and Virginia, with the result that Virginia was denied fair representation at the negotiations and its business was effectively destroyed when the ABA was compromised out of existence by the parties supposedly representing it.

WHEREFORE, the plaintiff prays that this Court ADJUDGE, ORDER and DECREE:

(a) That the defendants, Denver Nuggets, Inc., Long Island Sports, San Antonio Basketball, Ltd. and Arena Sports, Inc. have breached a fiduciary duty owed to Virginia.

(b) That the plaintiff be awarded compensatory damages of Five Million Dollars ($5,000,000.00).

(c) That the plaintiff be awarded punitive damages of Five Million Dollars ($5,000,000.00).

(d) That the plaintiff be granted such further relief as the Court may deem just and proper.

Dated: November 19, 1976
Norfolk, Virginia

Respectfully submitted,

NEW VIRGINIA SQUIRES

By _____
Of Counsel

Thomas H. Willcox, Jr., Esq.
Hugh L. Patterson, Esq.
Thomas G. Johnson, Jr., Esq.
Thomas R. Davis, Esq.
Guy R. Friddell, III, Esq.
Willcox, Savage, Lawrence,
Dickson & Spindle, P.C.
1800 Virginia National Bank Building
Norfolk, Virginia 23510

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, plaintiff hereby demands a trial by jury as to all counts herein.

Dated: November 19, 1976
Norfolk, Virginia

Respectfully submitted,

NEW VIRGINIA SQUIRES

By _____
Of Counsel

Thomas H. Willcox, Jr., Esq.
Hugh L. Patterson, Esq.
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Thomas R. Davis, Esq.
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Norfolk, Virginia 23510

rgbr

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OSCAR ROBERTSON, et al.,

Plaintiffs,

v. 70 Civ. 1526

NATIONAL BASKETBALL ASSOCIATION, et al.,

Defendants.

Before:

HON. ROBERT L. CARTER,

District Judge

New York, September 8, 1976
Room 519 - 2:00 p.m.

APPEARANCES

LOVEJOY WASSON LUNDGREN & ASHTON, Esqs.,
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-and-
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PROSKAUER ROSE GOETZ & MENDELSOHN, Esqs.,
Attorneys for Defendant NBA,
MICHAEL CARDOZO, Esq.,
of Counsel

EXHIBIT B 1

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

APPEARANCES
(Continued)

SPENGLER CARLSON GUBAR & CHURCHILL, Esqs.,
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ROBERT S. CARLSON, Esq.,
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MICHAEL GOLDBERG, Esq.,
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SCHWARTZ HALPERIN & SCHREIBER, Esqs.,
Attorneys for Virginia Squires,
ALLEN G. SCHWARTZ, Esq.,
of Counsel

O'DONNELL & FLOURNOY, Esqs.,
Attorneys for Leonard A. Bloom, President of San Diego Professional Basketball Corpo.,
PETER H. FLOURNOY, Esq.,
of Counsel

WEIL GOTSHAL & MANGES, Esqs.,
Attorneys for NBA Players Association,
IRWIN HOWARD WARREN, Esq.,
of Counsel

P r e s e n t:

LEONARD A. BLOOM

ELIZABETH HARNER

THE COURT: Oscar Robertson v. the National Basketball Association and the American Basketball Association crosscomplainants against the NBA.

All right, Mr. Flournoy, I have read your papers and am now in a position to give a little bit more intelligence to the issues you raised.

I want to be clear, who is here that represents the ABA, anyone?

MR. CARLSON: I and Mr. Goldberg, your Honor.

THE COURT: All right, Mr. Goldberg is the one I think I want to hear from.

Frirst on the cross claim of the ABA against the NBA, what is the status of the various cross claimants?

MR. GOLDBERG: I think I can best summarize that by saying that the American Basketball Association and presently I believe six of its clubs have entered into a settlement, a stipulation of dismissal with respect to that cross claim.

With respect to certain others, I believe a motion is going to be made in the very near future that those claims be dismissed in that the ABA came into possession or control of the causes of action and I believe at this stage of the game, your Honor, the only cross complainants that have not settled are San Diego, the former Virginia

franchise --

THE COURT: As far as I can understand the status of the Virginia Squires, it is that they are not, as I understood yesterday and the representative who is here today can tell me otherwise, but as I understand his position, the position of the Virginia Squires is that they are not complaining and do not want to contest the dismissal of the action.

They want to be sure that whatever their rights are survived and they want to move thereafter. The only one that is contesting it, as I understand it, is the San Diego club. That is my understanding of the picture. Is that correct?

MR. GOLDBERG: Yes.

There is only one other club which is not here today and that is the trustee in bankruptcy for the defunct Utah Stars. He has not entered into a stipulation of settlement and dismissal of that claim.

The corporate entity is Mountain State Sports, Inc., which is, I believe, the way that entity appears in the caption of the suit.

MR. FLOURNOY: If I might add one point of information to what Mr. Goldberg has said, your Honor.

I believe your Honor heard or at least there

was filed in this case a motion by the New Orleans Buccaneers, and I believe the result of their motion to intervene was their intervention was allowed and I am not sure that they have intervened.

THE COURT: Yes, but that was at a time when there was some objection to what was going on.

One of the clubs sought an injunction and then they reached an agreement. I don't know whether that was New Orleans or not.

MR. FLOURNOY: I believe it was St. Louis. I received yesterday a letter from the counsel for the Buccaneers indicating that they were opposed to this motion, so that would make at least four remaining cross complainants.

THE COURT: Not four remaining cross complainants. The Virginia Squires are not, although they remain, and the trustee in bankruptcy in Utah, we don't know what their position is and you are objecting. What is the status of New Orleans, do you know?

MR. GOLDBERG: Other than the fact we consented to their intervention, I don't know. Maybe Mr. Cardozo does.

MR. CARDOZO: Following the motion to intervene, for some reason New Orleans saw fit to start a federal lawsuit in New Orleans Federal lawsuit in New Orleans

Federal Court essential copying the allegations of both the complaint in the 1969 action in California and the crossclaim here and at the present time we are considering what action to take.

MR. SCHWARTZ: Your Honor, may I just make one clarifying statement on behalf of the Squires to which you just alluded. Your Honor is quite correct with regard to the position we have asserted. We were not parties to the settlement agreement and the point that I tried to make yesterday was that we not only were not parties, but that Mr. Furth, who was the attorney in the action representing the Squires, didn't participate in any of those settlement negotiations nor did he provide any of the papers, so I didn't understand that you had been led to believe in July that all the teams had agreed to the settlement because obviously the Squires had never been part of that and you are right, what we want to do is just preserve our claims.

We don't see any sense in leaving us as any one party, two or third party to litigate the remaining claims. I think your Honor is quite correct. Thank you

MR. FLOURNOY: Just for the record could I

after the hearing perhaps give a copy of this letter that was addressed to me care of you from the Buccaneers wherein they say they are opposed to the motions?

THE COURT: If they have filed a separate lawsuit I wouldn't thir you would need to protect their rights at all and I am reasonably sure that some action is going to be -- it is probably going to be taken by one of the parties in regard to that lawsuit in New Orleans.

As I understand your position, Mr. Flournoy, your position is that you were not aware and were not kept abreast of the fact that any negotiations were going on and you weren't aware that any settlement discussions were going on nor that any matters were being taken which would affect the rights of your San Diego club. You became aware of that only some time late in August. I will accept that. I find it extraordinarily difficult to accept, but I will, with all the publicity which surrounded every act in terms of this matter in this part of the country, and I might even say I wasn't even able to escape it, the publicity about it, when I was in London, that you were not aware of the fact that the negotiations were going on and that these matters were reaching a point where there was some accommodation being discussed between the ABA various clubs and the NBA affecting your rights,

but that's neither here nor there.

The point is that as far as I can see where we stand, it is that the ABA itself and six clubs are in favor of and have joined in a motion to dissolve the injunction. You are opposing it and New Orleans hasn't made any motion, but is going into a separate lawsuit. We don't know what position Utah is going to take. The position of the Virginia Squires is clear, or reasonably clear. What that leaves is that the San Diego club, at least in this litigation, is left I think with the possibility of being joined by New Orleans and Utah is being left the only entity that is maintaining a cross claim in this action. I frankly don't know what position that's going to leave you in, but I don't believe that you have any basis to keep the other parties from, one, settling and compromising their position if they want to. I am not sure.

The argument that you are going to make in terms of not dissolving the injunction I will hear again, but I think that where we stand is that you are going to be in a position if your cause of action is to survive, where it will survive alone and you will have to carry it alone.

I understand from Mr. Goldberg that a motion

is going to be filed on behalf of the ABA, I gather, on the theory that the causes of action, the cross claim belongs to it and not to the various member clubs, which I suppose you are going to have to meet.

MR. FLOURNOY: Excuse me, that doesn't involve San Diego's claim.

MR. GOLDBERG: No, it does not involve San Diego's claim. It is with respect to several other cross claims.

THE COURT: I will hear from you, Mr. Flournoy.

MR. FLOURNOY: Your Honor, if I might just quickly correct one thing.

Our position isn't exactly that we were totally unaware that something was happening in New York. Really, our position is that we thought our interests were being represented with respect to whatever it was that was happening in New York. We didn't discover until quite recently, the tailend of August, that our interests were not and had not apparently been represented by Mr. Furth, even though Mr. Furth is still today even counsel of record for San Diego, I am just appearing here specially.

THE COURT: What is your interest now?

MR. FLOURNOY: San Diego Professional Basketball Corporation's interests?

Your Honor, my interest is this, particularly after having listened to the hearing yesterday, it seems to me that in all likelihood your Honor will approve sore time in late September or possibly early October the ABA Players Association class settlement. Your approval of that is going to necessitate your reviewing, if your Honor hasn't, and I don't know whether he has, the expansion agreement. As a matter of fact, I might ask the Court, has the expansion agreement been presented to the Court and approved by it?

MR. CARLSON: Your Honor, when we filed the ABAPA stipulation of settlement agreement with you we also filed with the Court, as is contemplated by the agreement, copies of the expansion agreements.

THE COURT: I understood that you had, so what I have before me, I have all the various documents representing all the various steps that the NBA and the ABA are talking with regard to the expansion, what you were going to do before the draft, how that was to operate, what was to be paid, so forth and so on, that was put before me some time in July, is that right.

MR. CARLSON: That's right.

MR. FLOURNOY: Your Honor, if I could just ask becuase I really don't know, was our counsel of record

present at the hearing where it was put forward?

MR. CARLSON: Mr. Goldberg has been counsel of record to the ABA and its teams along with Mr. Furth. As I recall, he was present at the conference on July30th.

MR. FLOURNOY: My understanding of Mr. Goldberg's position was he was strictly local counsel to Frederick Furth. Mr. Goldberg was counsel so Mr. Furth could appear in this action, but whatever the case is, your Honor is, I am sure, picking up on what we feel has occurred.

THE COURT: The point is Mr. Furth was counsel for the ABA and its member teams as was Mr. Goldberg and I think there was someone else, from timeto time Mr. Mason, Mr. David Mason, who would appear from time to time with Mr. Furth who I gather Mr. Mason is from California, from San Francisco.

MR. FLOURNOY: He is inMr. Furth's offices.

THE COURT: He would appear from time to time, Mr. Goldberg would appear and then earlier on we had a counsel from New Jersey whose name I have forgotten.

MR. CARLSON: His name was Robert Neff, all of whom represented the NBA -- I mean the ABA.

MR.FLOURNOY: Your Honor, I believe even yesterday in this courtroom, but perhaps your Honor took the bench, I really don't recall, Mr. Furth indicated that

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he had never seen a copy of the expansion agreement.

THE COURT: I am not in any position to do that, plus the fact, Mr. Flournoy, I don't think we need to delve into that.

I don't believe that the ADA is going to be able to take the position that throughout these negotiations and so forth that it was not represented by counsel. I think it would be impossible for it to take that position.

MR. FLOURNOY: I am not speaking with respect to the ABA, your Honor.

THE COURT: The point is that the ABA counsel purported or was representing all the member clubs. We did not have until yesterday counsel for any individual clubs. I am sorry, I take that back. In our intervention hearings counsel for St. Louis and so forth came in when those entities were objecting to the settlement and that's the first time that any appearance has been made on the part of counsel for any individual club, with the exception I think of the Madison Square Garden, I think that's always been separate counsel apart from Mr. Cardozo and Mr. Stern. Separate counsel has always represented Madison Square Garden and has appeared from time to time.

MR. FLOURNOY: If I could just ask one other question for information. As I said in my affidavit I did

receive very courteously from Mr. Carlson a copy of the expansion agreement on I believe the morning of the 2nd of September. [illegible] Listed as some of the other documents that will come within the expansion agreement so to speak is a document entitled "Indemnification Agreement" which I received this morning about 11:30 or 12 o'clock. Does your Honor know whether that has been filed with this Court and whether your Honor has had a chance to read that? [illegible]

MR. CARLSON: Your Honor, the indemnification agreement was not an exhibit to the expansion agreement. It was not filed with the court along with various other agreements that the ABA and the NBA may have made, such as how a particular player's salary might be handled. The closing documents in this case are approximately four volumes. They would go up to about the ceiling. The expansion agreements were filed with the Court because it was required by the ABAPA agreement. The expansion agreement and all its exhibits are before the Court.

THE COURT: The indemnification matter has been the subject of some newspaper comment and I gather, I think, it wasn't filed with me, but I think I read something, I don't know what the terms are, but I have read about -- [illegible] we are talking about something else. [illegible]

MR. FLOURNOY: Very well, your Honor. You asked me the question before and before I could really answer that question what our position is, what it was that we wanted, I wanted to know what your Honor had seen and what he hadn't so I could avoid rearguing something your Honor had already decided.

THE COURT: I haven't decided anything in regard to the matter. My position, as I think I stated at the outset, whatever the merits of your position in regard to this matter, you are not, I don't think you are in a position to be able to keep the ABA and the six parties that want out of this litigation, to keep them from doing so.

MR. FLOURNOY: Your Honor, to a large degree I would agree with that.

The manner and the method that the settling parties had and areusing was the usual one when you had multiple plaintiffs, or in this case multiple cross complainants, but I don't believe it is the usual one. Part of the unusualness that I object to with respect to the expansion agreement is the indemnification agreement and the effect that agreement has on the remaining cross complainants who wish to continue the litigation.

THE COURT: Tell me about that.

MR. FLOURNOY: Well, your Honor, may I approach

the bench?

THE COURT: Sure.

MR. FLOURNOY: This is a Xerox copy of what I received today. With respect to -- perhaps I don't fully understand it, but it appears to me that the settling ABA cross complainants and the ABA is indemnifying the NBA against various costs and expenses; that these costs and expenses are to be paid under this agreement within ten days of demand, and this cost and expenses included any costs by the NBA or its member teams in connection with investigating, responding or defending to any covered claim, or in connection with any settlement or compromise of any covered claim and then you have the usual language in an indemnification agreement that talks about reasonable attorneys' fees and here it also includes witness fees, accountants' fees, et cetera.

THE COURT: How does that compromise you?

MR. FLOURNOY: That compromises us, your Honor, because this agreement was entered into in July of 1976 signed by the settling teams, the six cross complainants and apparently the holders of the rights of an additional three of the original cross complainants. This action is covered by that indemnification agreement.

That means that, No. 1, the point I made

yesterday and in my papers in terms of being deprived of counsel. The experienced antitrust litigation counsel who has prepared this case for trial and who I believe in June informed me that the case was ready to go to trial will no longer be able to represent us, or that he possibly will not be able to represent us.

Secondly, it has eliminated not just our fellow cross complainants, but it may have dramatically changed the value and worth of discovery that has been done to this point. That is, the NBA has taken depositions of many -- apparently of many of the personnel of the settling ABA teams with respect to the causes of action in this action, but generally in depositions the deponent does not really tell his side of the story, he just responds to questions from opposing counsel who is taking his deposition. With this indemnification agreement it would seem to me that probably the testimony of the personnel involved with nine of the cross complainants is going to be lost to the remaining cross complainants because there is no way they are going to testify to anything that in effect is going to contribute to their liability under this indemnification agreement.

THE COURT: I don't understand that. All the claims that you have, all the cross claims that you have are against

the NBA and any of its member clubs.

MR. FLOURNOY: That is correct.

THE COURT: This indemnification agreement says if any of those claims are pursued, those clubs that are now in the expansion will indemnify the NBA and any of its member clubs.

MR. FLOURNOY: That's correct.

THE COURT: Therefore, what this means, it seems to me, what they are saying as far as I can understand it is that if you are able to pursue and prevail on a cause of action, either San Diego or Virginia or whatever against the NBA, these clubs will have to indemnify them for whatever the costs are for the litigation.

MR. FLOURNOY: Unless I misread it, we don't have to prevail, it means all the costs incurred on a day-to-day basis.

THE COURT: Any costs that are incurred by virtue of it, they are indemnified.

How does that adversely affect your rights?

MR. FLOURNOY: With respect to the discovery I just spoke of and with respect to being represented by Mr. Furth. Let me ask your Honor this question because it is a question I have had since I realized, No. 1, there was an indemnification agreement, and since I hardly went

through some of the exhibits to this motion, here we have the ABA and four "failing companies", they are about ready to go out of business, apparently, at least that's what we are being led to believe. Why does the NBA, who is supposedly a strong entity, need this indemnification from four failing companies?

THE COURT: That's besides the point.

MR. FLOURNOY: I don't believe it is, your Honor.

THE COURT: I think so.

MR. FLOURNOY: The reason I don't believe it is --

THE COURT: That's besides the point. Unless you can show me that the agreement between the parties -- as far as I know that agreement was a part of arm's length bargaining between the parties. This is a voluntary agreement. Unless you can show me there is some contrivance, what interest is it to you? The point is that here are people that have reached an accord in regard to their own litigation, or at least part of the litigation which you are involved in and the NBA, in order to protect itself against you and others that may not settle, says okay, what we are going to do, as part of the price for our peace with you, what we want is to be indemnified. It is a perfectly natural kind of situation. As I said, the only way I think you can get under that, Mr. Flournoy, would

rgbr 19

be to show me that there was some contrivance and that this was made in part to defeat your rights.

I don't see how you can do that.

MR. FLOURNOY: Your Honor, I don't believe I can do more today is one of the problems I have. I just received this indemnification agreement. I have been told it is not relevant, but it is not the normal indemnification agreement.

THE COURT: You don't have to be concerned with that today. Obviously what's involved for you is a very serious question apparently. I can't foreclose your claim.

MR. FLOURNOY: Yes, you can.

THE COURT: What you are telling me, what the reality is, if the ABA and these other clubs settle and Mr. Furth is counsel, the probability is that he would not be able, having represented the ABA which has now settled, he probably would not be in a position to represent any contending club under any circumstances, not in this court. If he were to attempt to represent I think there would be a motion made in regard to the confli of interest so that problem is put aside, but it appears to me that your action, if you want to maintain it and pursue it, remains.

MR. FLOURNOY: Your Honor, the difference that

SOUTHERN DISTRICT COURT REPORTERS U.S. COURTHOUSE

I see and the difference that I am trying to bring before your Honor with respect to the way other multi-party actions have been settled is that -- my point, No. 1, there is no need for the indemnification agreement. The indemnification agreement gives rise to the conflict that will eliminate counsel for us who has prepared this case for trial. I agree there is nothing to prevent some plaintiffs from settling with the defendant. Fine, let them settle. That is great.

But this agreement that your Honor has indicated you must approve before it is effectuated under your April 3, 1973 order is more than is necessary to settle this litigation. It is more than is necessary --

THE COURT: I understand from Mr. Cardozo that this was not presented to me, is that right?

MR. CARDOZO: Thatis correct, your Honor, because it was not an exhibit to the expansion agreement. The expansion agreement was filed --

THE COURT: It was not presented to me, Mr. Flournoy, so if it hasn't been presented to me it is not one of the things I am required to approve.

MR. FLOURNOY: Except it is an integral part of this expansion agreement. It is referred in here, it is covered by the security agreement, of which your Honor

was given a copy of to 1-ok at.

It is referred to several times in the basic agreement. My point is this, your Honor --

THE COURT: I think I understand what your point is.

MR. FLOURNOY: It is important that the basketball players, that all the people remaining in professional basketball are employed in this coming season, as many as possible and your Honor has to do whatever he believes he can do to be sure that that occurs. Yesterday one of the things I was really impressed throughout the whole hearing was with your Honor's concern that as many players as possible be either recompensed or protected under the class action settlement, which is one of your duties, actually, under the class action rules. You don't have a class action here so maybe I am asking you more than you are really under some statutory obligation to do,but I think your approach to this whole litigation has been careful enough and concerned enough that if there are two or three things or one or two things that aren't necessary to the settlement that could be put to one side, or at least further discussed and let the main settlement go through, that your Honor would want to do that. This order indicates -- and again maybe I am misreading it, but

I don't think I am -- that any agreement reached between the NBA or ABA or any of its member teams with respect to merger, acquisition, et cetera, shall be submitted to the Court for approval prior to any implementation or effectuation thereof and it shall expressly provide and be contingent upon such approval.

Your Honor, you were not presented with this indemnification agreement. It is in effect. It's been in effect since apparently July 26th or 29th.

Under that agreement apparently we have been unrepresented, which we really didn't discover until the 22nd of August, or perhaps we would have been able to come in before your Honor with more lead time before the basketball season opens to make our arguments and that's why I think there has really been an attempt to circumvent this Court.

THE COURT: If I understand your problem, you are concerned about the indemnification because you think that by it being in effect, that you think now that that is the thing that deprives you of Mr. Furth's services.

MR. FLOURNOY: That and one other thing, your Honor, which I have not yet seen.

THE COURT: What is that?

MR. FLOURNOY: That is whatever agreement is in existence between Mr. Furth and the ABA and the settling

ABA defendants. Rumor has it that that agreement calls for him to withdraw as counsel, but I can't really represent that that's a fact to the Court because I haven't seen the agreement.

THE COURT: I don't know what that is. I don't know what the terms of that are, but let me put it to you this way: I think it would be very difficult in my judgment for Mr. Furth, having represented the ABA and the ABA having settled this litigation and being a party to the settlement and approving the settlement and so forth, I think Mr. Furth would be in a very difficult position without the indemnification to pursue this litigation on behalf of any member team. I think he would be.

MR. FLOURNOY: I am not sure he would, your Honor, because the case is really against the NBA and the NBA teams, it is not against these expansion teams. As I read the expansion agreement, to a very large extent the expansion teams even when they go into the NBA have a very little financial stake in, for example, the revenues that occur, et cetera, so I am not sure -- I don't know, but I am not sure.

THE COURT: I don't think we understand one another. Your counsel is not going to be suing the expansion teams, is he?

MR. FLOURNOY: That's correct.

THE COURT: He is going to be maintaining his action against the NBA.

MR. FLOURNOY: That's correct.

THE COURT: I am saying to you that Mr. Furth having represented the ABA, which is the overall entity that has settled and wants out of the litigation, that without the indemnification I think Mr. Furth would have a difficult position to attempt to represent you and to continue this lawsuit.

MR. FLOURNOY: I really believe that's incorrect, but I don't have the cases to point that out to you.

THE COURT: In any event --

MR. FLOURNOY: It's been my general experience, your Honor, sure some people can settle out, but the person charged with the litigation continues on for those plaintiffs who want to continue to litigate.

THE COURT: The point is that the party that settled out, the main party that he represents is the ABA and he is representing these member clubs because they are a part of the ABA, but in any event let me just put it this way: I don't see any way, Mr. Flournoy, that I can find on the basis of our argument that I can indicate that this indemnification agreement is something that I would

litigation because this is a class suit. I am not here to protect Mr. Carlson's group or the Virginia Squire Corporation or anything like that.

MR. FLOURNOY: Your Honor, I had thought, I believe it was in your July 30th opinion or maybe it was earlier, but in one of those opinions a statement was made that was clear to you even at that point that any consolidation of the ABA and NBA would violate the antitrust laws of the United States. Then when I read this order I got the impression, No. 1, you were concerned with the class -- whether it's the NBA players or the ABA players, you were concerned with their rights, but that you were also concerned that nothing would happen while litigation was presented which would be clearly violative of the law, so any settlement or merger consolidation, this doesn't speak of settlement, would be submitted to you for your review.

THE COURT: I don't remember making the statement about that. I could have, I am no going to say I didn't, but my own feeling was I was very much concerned with the reserve clause, with the draft, with keeping players tied down and not being able to move. The question of the consolidation of the leagues, that being removed from it, I don't believe that I agreed that that would be a violation of the antitrust laws. If I had any such view

as that I certainly wouldn't be sitting here now or I would not have been in a position last April in telling Mr. Carlson, Mr. Furth and Mr. Goldberg and Mr. Cardozo and company to try to settle the litigation.

My view was that it would have been better for them to settle it.

MR. FLOURNOY: I understand what your Honor is saying and the only thing I would like to point out, which I think I have pointed out in my memorandum, is that there are a number of ways to settle this litigation. At this point I guess it is too late to settle it any other way, but it could have been settled with two viable leagues. It didn't have to be settled with the NBA coming out on top.

THE COURT: I think I am going to have to indicate some time next week, even if I postpone as I have had to do with the NAB matter, but in order to avoid any greater confusion in this matter, I am going to have to indicate how I feel, what my ultimate view is going to be about the settlement, what my ultimate view will be about the dissolution of the injunction. I am going to have to do that I think next week. My view is, as I said yesterday, that we are at a stage now where if somehow the parties aren't able to effectuate something that seems to me to be

a fair deal for the class and then I can't approve the settlement, it seems to me I am in a position of throwing the whole professional basketball matter into chaos.

MR. FLOURNOY: I realize I can't win if that's your position, but you can approve the class action settlement and you can approve the expansion agreement without approving the indemnification agreement.

I mean, your Honor, it doesn't make any sense to me that four failing companies in a defunct league, it is so important by the NBA to be indemnified against possible harm by these financially defunct companies.

THE COURT: I think you ought to submit a memorandum on the matter. Mr. Cardozo and Mr. Carlson, what is your view?

MR. CARLSON: I think your Honor's observation was sound. The conflict is not created in my view by any indemnification agreement. I think it is created by the shifting of allegiance. The settling defendants who move into the NBA become jointly and severally liable for all judgments and it is that which creates the conflict for Mr. Furth.

I would like to note also, your Honor, I have filed a reply affidavit. San Diego has filed a separate action in California against the ABA, the expansion

teams, all of the other teams and various individuals in which they seek substantial damages for alleged wrongful termination of their franchise in 1975. I would note that the maintenance over that action is not prejudiced by anything you do hear today.

MR. FLOURNOY: It doesn't mean anything.

MR. CARLSON: If I may make one more observation, since San Diego is not in the ABA, since they are not party to the preliminary action Robertson v. NBA where the injunction issued --

THE COURT: They are not?

MR. CARLSON: They are not. In the plenary action the NBA alone is a party. Since they are not a member team of the ABA they are not affected by the injunction. Consequently I am not sure they have any standing even to opposing the motion.

THE COURT: I wish that somebody had said that earlier. My assumption was when I had the action that was filed in California transferred here, that what was transferred was the ABA's action with all of its member clubs against the NBA and I thought that San Diego was a member club of the ABA at that time.

MR. CARLSON: They may have been a member club of the ABA at the time of transfer, which I believe was

in February '74, but their franchises thereafter lapsed and they are not now a member of the ABA and not subject to the injunction.

MR. CARDOZO: If I could just add, your Honor, the injunction which prohibits a merger which we are seeking now to have dissolved can't possibly have any effect on the company that stopped playing professional basketball a year and a half ago and that's the issue on this injunction motion.

THE COURT: All right. I suppose that's right, except for the fact that it would appear to me that there is a possibility that if San Diego had a cross claim that was viable and effective in 1974, that even though it was defunct and therefore not a part of the action, that it probably still has that, whatever rights it had at that point, but it must appear that if it was defunct and not a member club of the ABA since 19 some time it is not participating in this action so it is not really before me, I guess.

MR. CARDOZO: There is no question that they have filed a cross claim that they have status as a cross complainant, but the issue here in the Robertson v. NBA main action is whether your injunction which prevents an expansion at the present time should be dissolved, an injunc

not only to which they are not a party but to which theycannot be affected before.

THE COURT: All right.

MR. FLOURNOY: Could someone explain to me why we are not affected by that injunction?

THE COURT: Because of the fact that you haven't had a franchise that's now functioning. You haven't had a franchise for some years.

MR. FLOURNOY: It is not quite some years. No. 1, the franchise was purchased in July of '72.

THE COURT: The injunction operates as of the present. The argument is that you are not functioning in basketball. You may still have a claim for damages, but insofar as injunctive is concerned, you are not in the BASKETBALL WORLD.

MR FLOURNOY: Your Honor is correct except for one thing, and that is under the briefs that have been submitted here with respect to lifting the injunction, you can lift an injunction if the circumstances have changed and if there isn't going to be prejudice to any of the parties. Had we known that we were no longer protected, if you want to call it that, by the injunction, then perhaps our course of action would have been different six, eight months ago--present--we could be dissolved, or

THE COURT: Allright, Mr. Flournoy, I have given you a great deal of time on this because I think that you are entitled to it, but it seems to me that we are now beginning to talk in circles.

MR. FLOURNOY: Okay, your Honor, could we go to the merits of the memorandum with respect to lifting the injunction?

THE COURT: What do you mean by that? Go wherever you want to go and let me see whether I can follow you.

MR. FLOURNOY: I am talking about the ABA and the NBA argument that the expansion, the lifting of the injunction so the expansion can occur is, No. 1, not violative of the antitrust laws and No. 2, even if it is violative of the antitrust laws is sheltered by the failing company defense.

THE COURT: I think where we meet, tell me whatever you want to tell me on that, but I think you are in no better position. On that youhave to meet Mr. Cardozo and Mr. Carlson's argument outstanding.

MR. FLOURNOY: Your Honor, that argument was presented to me for the first time when I walked into the courtroom this afternoon.

THE COURT: But your argument was presented to

them for the first time when you handed them a piece of paper yesterday.

MR. FLOURNOY: And your Honor put the hearing over until today.

THE COURT: That's right. The question of standing is what right have yougot toobject to the injunction if you are not in basketball. The only right that you have at the present time, it seems to me, is whatever right is preserved in terms of any damages that have occurred to you before you went out of basketball by virtue of any antitrust action that was taken on behalf of the NBA.

MR. FLOURNOY: Okay, your Honor, to a large extent that is correct, but, No. 1, let me say that the San Diego Professional Basketball suit against the NBA in San Diego has very little in one sense to do with this action. What it does have to do with this action is that in that suit it is alleged that the franchise was wrongfully taken and there is a request there, as I believe, although I am not handling that suit, there is a request there for a constructive trust to be imposed upon the assets, i.e. players and player contracts which were wrongfully taken. Okay, now, I belief, although I don't have all the facts, and maybe Dr. Bloom can answer this question better than I can, but I believe some of the players who are being transferred

into the ABA -- excuse me, are about to be transferred into the NBA, there is still a claim for their -- that their contracts, their service to some extent were wrongfully taken assets of San Diego Professional Basketball Corporation so to that extent San Diego is still a part of basketball. [illegible] are not.

THE COURT: I don't know where those claims are, Mr. Flournoy. None of that has been presented to me. [illegible]

MR. FLOURNOY: The reason it hasn't been presented is because I didn't realize our standing to be here was in question. I have been in touch with these counsel and indicated to them since last Friday that I was intending to appear and none of them said there was some problem withstanding with respect to this motion.

THE COURT: The point is I don't care what they have had to say, Mr. Flournoy. The issue is that you are attempting to represent and to argue about injunctive relief in respect to a matter in which you have no longer any interest. You are not in basketball at the present time. You haven't fielded a team. Without regard to the matter of the validity of it, your argument is with the ABA as to whether they took it away. The point is that you have no franchise at the present time. You haven't had

one for about a year. The injunction that you are talking about dissolved and the only people I think that can object to that are people who are either players or some team that is currently operating. The only thing that you have at the present time is an action for damages.

MR. FLOURNOY: Does Utah have standing to be here?

THE COURT: I don't have to answer that. They are not here, are they? You are not representing them.

MR. FLOURNOY: No, your Honor, I am not.

THE COURT: All right, and you are not representing New Orleans either. You have to confine yourself to what youare representing and I don't believe that you have any standing to make any objection to the dissolution of the injunction.

If you want to present any further papers on the matter you may do so. My time table is that I think I am going to have to conclude this matter no later than the close of next week.

MR. FLOURNOY: I am very clear what you want. I would imagine there is no point in submitting any papers until I can submit papers that make a decent argument that we do have standing to be here.

THE COURT: All right. Anything else?

MR. FLOURNOY: Only to request that that letter can be made a part of the record from the Buccaneers.

MR. CARDOZO: I have no objection.

THE COURT: All right.

MR. FLOURNOY: And also, of course, the indemnification agreement.

THE COURT: That's right, you gave this to me.

Anything further, gentlemen?

MR. MC AMIS: Your Honor, if we could turn for just a minute to the ABA players' case I would like simply to file two supplemental affidavits which respond to points that came up during yesterday's settlement hearing and which we believe will provide the Court with additional information to enable you to reach a determination. One concerns the efforts that Mr. Yancey and others made to make sure that the Virginia players who were objecting were advised of the course of the settlement negotiations, particularly of the fact that it was the position of the ABA players to try to get guarantees for players on teams like Virginia that would not be taken into the combined league.

THE COURT: All right, just file it.

MR. MC AMIS: I would like to file that.

The other affidavit, also of Mr. Yancey, relates to the pension rights matter and sets forth our position on that dispute with the ABA.

We have today received a letter from Mr. Carlson setting forth the ABA's dispute and I think that letter has been sent to the court.

THE COURT: I haven't seen it.

MR. MC AMIS: It offers a compromise in some respects, but --

THE COURT: I haven't seen it yet. I haven't seen Mr. Carlson's letter.

MR. MC AMIS: In view of notice and other problems we feel that our position is the correct one, but we velieve that the Court now has before it the information that you requested yesterday at our conference.

THE COURT: Anything else?

MR. CARDOZO: If your schedule permits, your Honor, Mr. Mc Amis and Mr. Carlson and I have a problem that is unrelated to the hearing we just had that we would like to discuss with you in your chambers.

THE COURT: All right.

I suppose I can ask the question, because what I have to find out is what is our posture in regard to the pension matter dispute. You present me with

one position and Mr. Mc Amis another.

Am I to resolve it by taking one or the other or taking my own?

MR. CARLSON: Your Honor, I in my statement of the issues --

THE COURT: Maybe we better discuss it when we discuss the other matter.

I think, gentlemen, we will be more comfortable in my chambers rather than in this robing room.

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MR. BOMSE: THE ISSUE OF WHETHER OR NOT WE SHOULD BE FORCED TO PROCEED HERE TODAY OTHER THAN THROUGH MR. FURTH. IT'S THE BASIC ISSUE WHICH OUR MEMORANDA ADDRESSED AT SOME FAIR LENGTH.

THE COURT: WELL, ARE YOU CONCEDING THE OTHERS, FOR LACK OF PROSECUTION, ET CETERA?

MR. BOMSE: NO, YOUR HONOR, NOT AT ALL. INDEED, OUR BASIC POSITION WOULD BE, IF YOUR HONOR RULES AGAINST US IN TERMS OF WHO OUGHT TO BE PROCEEDING FOR THEM -- THEN WE WOULD LIKE TO HAVE ALL THESE MATTERS PUT OVER UNTIL WE CAN GET AS FAMILIAR AS MR. CARDOZA IS, AS FAMILIAR AS MR. FURTH IS, AS FAMILIAR AS MR. CARLSON IS AND AS FAMILIAR AS THE COURT IS. BECAUSE --

THE COURT: WELL, I AM SATISFIED THAT THERE IS SUCH A CONFLICT HERE THAT IT WOULD BE ENTIRELY IMPROPER FOR ME TO CONTINUE MR. FURTH AS COUNSEL FOR THE PLAINTIFFS. HE REPRESENTED THE ABA AND THE NAMED PLAINTIFFS AT THE REQUEST AND DIRECTION OF THE TRUSTEES OF ABA. IS THAT WHAT YOU CALL THEM? AND THE COMMISSIONER. AND HAVING BEEN DELEGATED TO EXERCISE THIS RESPONSIBILITY, HE DID SO, I ASSUME, AT THE TIME WITHOUT FOR ONE MOMENT BELIEVING THAT THIS TYPE OF CONFLICT WOULD ARISE. SO THAT WE WOULD HAVE TO SAY THAT HIS REPRESENTATION AT THAT TIME OF ALL PLAINTIFFS, THE ABA AND THE COMMISSIONER AND THE TRUSTEES, WAS A GOOD-FAITH REPRESENTATION.

IT SUBSEQUENTLY DEVELOPED THAT THIS LITIGATION IS

IN A SENSE SETTLED BY REASON OF THAT SETTLEMENT, EXCEPT FOR CERTAIN PARTIES WHO NOW MAKE CLAIMS, ON THE THEORY THAT THEY ARE NOT BOUND THEREBY, OR THAT THE TERMS AND CONDITIONS ARE SUCH THAT THE AGREEMENT IS A NULLITY. THERE ARE OTHERS WHO HAVE DISMISSED, A SUBSTANTIAL NUMBER OF THEM. AND NOW MR. FURTH FINDS HIMSELF IN A VERY DEFINITE CONFLICT. HE CANNOT HAVE REPRESENTATIVE PEOPLE WHO DISMISSED AND WHO ARE ANXIOUS TO HAVE ALL OF THIS LITIGATION TERMINATED THEMSELVES, AND AT THE SAME TIME REPRESENT THE PEOPLE WHO DON'T WANT IT TERMINATED.

MR. BOMSE: WELL, YOUR HONOR, COULD I BE HEARD ON THAT? BECAUSE WHILE I UNDERSTAND WHAT YOUR HONOR IS SAYING, IT'S THE SAME ARGUMENT THAT IN EFFECT MR. FURTH AND MR. CARLSON MAKE, AND I THINK IT OVERLOOKS A COUPLE OF POINTS.

OUR VIEW IS, IN THE ORDINARY SITUATION WHERE A LAWYER REPRESENTS SEVERAL PLAINTIFFS, IT MAY HAPPEN THAT SOME OF THEM WILL SETTLE. THERE IS NO REASON ON THOSE FACTS ALONE WHY THAT LAWYER HAS ANY CONFLICT OF INTEREST AND CAN'T GO ON REPRESENTING THE OTHER PEOPLE HE IS REPRESENTING. HERE THE ONLY DIFFERENCE IS THAT IN FACT SOME OF THE CLIENTS MR. FURTH REPRESENTED, NAMELY FOUR FRANCHISES IN THE ABA, HAVE NOW GONE AND GOTTEN IN BED, IF I CAN USE THAT COLLOQUIALISM, WITH THE NBA; AND THAT, I SUGGEST, IS ENTIRELY --

THE COURT: WELL, SHOULD HE BE FIGHTING THE NBA FOR CLIENTS OF HIS THAT WENT TO BED WITH THE NBA? SHOULD HE? SHOULD HE DRIVE THEM OUT OF THAT BED?

EXHIBIT D TO AFFIDAVIT OF FURTH

ORIGINAL
FILED
DEC 23 1976
WILLIAM L. WHITTAKER
CLERK, U. S. DIST. COURT
SAN FRANCISCO

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMERICAN BASKETBALL ASSOCIATION, et al., Plaintiffs, v. NATIONAL BASKETBALL ASSOCIATION, et al., Defendants.	No. 51055 ATZ ORDER
NATIONAL BASKETBALL ASSOCIATION, et al., Counterclaimants, v. AMERICAN BASKETBALL ASSOCIATION, et al., Counterdefendants.	

Furth, Fahrner & Wong (successor to Law Offices of Frederick P. Furth) and Frederick P. Furth and Daniel S. Mason and Sommer, Tinkham, Barnard & Freiberger and William C. Barnard having applied for an order relieving them as counsel to all plaintiffs herein;

And the National Basketball Association defendants having moved for an Order dismissing the Complaint with prejudice;

And the American Basketball Association having moved for an Order dismissing the Counterclaim of Lemt Corporation

EXHIBIT D

with prejudice;

And said matters having come to be heard before the Court on November 22, 1976; the Court makes the following findings and orders:

- Frederick P. Furth and Furth, Fahrner & Wong (successor to Law Offices of Frederick P. Furth) and William C. Barnard and Sommer, Tinkham,Barnard & Freiberger were originally retained as counsel for plaintiffs by the Commissioner of the American Basketball Association, and its Board of Trustees;

- Certain member teams of the American Basketball Association, including certain successors in interest of certain plaintiffs have reached an agreement to compromise and settle this matter with certain defendants and certain of their successors in interest;

- As a result of the aforesaid compromise and settlement by certain plaintiffs and certain of their successors in interest, a conflict has developed vis a vis the continued representation of plaintiffs by Frederick P. Furth and Furth, Fahrner & Wong and William C. Barnard and Sommer, Tinkham, Barnard & Freiberger;

- The interests of justice, therefore, require that the Court relieve Furth, Fahrner & Wong, Frederick P. Furth and Daniel S. Mason and Sommer, Tinkham, Barnard & Freiberger and William C. Barnard as counsel of record to all plaintiffs;

IT IS HEREBY ORDERED:

- Furth, Fahrner & Wong, Frederick P. Furth and Daniel S. Mason, and Sommer, Tinkham, Barnard & Freiberger and William C. Barnard are hereby relieved as counsel for all plaintiffs.

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EXHIBIT D TO AFFIDAVIT OF FURTH

IT IS FURTHER ORDERED:

- The National Basketball Association defendants' motion for an Order dismissing the Complaint with prejudice and the American Basketball Association's motion for an Order dismissing the Counterclaim of Lemat Corporation with prejudice are continued to January 4, 1977, at 10:00 a.m.

Dated: December 23, 1976
San Francisco, California

ALFONSO J. ZIRPOLI

Alfonso J. Zirpoli
United States District Judge

FURTH, FAULKNER & WONG
ROSS BUILDING, SUITE 1330
SAN FRANCISCO, CA 94104
TEL. (415) 421-3070

EXHIBIT D TO AFFIDAVIT OF FURTH

Approved as to form:

Frederick P. Furth
Daniel S. Mason
Furth, Fahrner & Wong

William C. Barnard
Sommer, Tinkham, Barnard & Freiberger

By _____
Frederick P. Furth
Counsel for Plaintiffs

Richard J. Archer
John E. Krzywicki
Sullivan Jones & Archer

Proskauer, Rose, Goetz & Mendelsohn

By _____
John E. Krzywicki
Counsel for Defendants except
LEMAT Corporation

Robert L. Dunn
Bancroft, Avery & McAlister

By _____
Robert L. Dunn
Counsel for LEMAT Corporation

Stephen V. Bomse
Heller, Ehrman, White & McAuliffe

By _____
Stephen V. Bomse
Special Counsel for New Orleans
Buccaneers, Inc., Trustee in
Bankruptcy for Mountain States
Sports, Inc. and San Diego
Professional Basketball Corporation

and Mr. Greenberg and Mr. Carlson at least ought to be the people to try to reach an agreement as to what the order should contain. If we can't do that we will have to do something else.

MR. SCHWARTZ: Allen Schwartz and my firm is Schwartz, Halperin & Schrbier. We were asked to appear here today by the new Virginia Squires. The Squires received a letter from Mr. Furth who has been counselor for the Squires in this action together with the other ABA teams inform us of certain developments which had taken place.

Specifically, the Squires, which never received a copy of the settlement agreement nor were they privy to any of the matters in the settlement negotiations, were told that a settlement agreement had been arrived at, told that Mr. Furth had not been involved in negotiating the settlement agreement and were told that five of the other six teams had entered voluntary dismissals and that the sixth had executed a general release and a covenant not to sue.

Now, the reason we are here today is because there is an inherent conflict between the position of the Squires and all the other teams in the ABA and some of the other defendants in this action and the ABA and the NBA. One

of the things that we are concerned about and the principal concern that we have is that orders entered by the court in connection with the motion to lift the injunction and the settlement of the overall action may have a negative effect on claims which the Squires have and wish to assert. There has been no reference, today, to the specifics of the circumstances under which the Squires' franchise was terminated or the merger was accomplished.

Without belaboring to the court, it's apparent to the Squires that the negotiations that were undertaken by representatives of the teams and of the league, the ABA, entailed a merger that in effect excluded the Squires and that in the context of those circumstances the Squires' franchise was terminated.

In essence the Squires have a claim which they are going to assert at some point in time with regard to the circumstances of the merger and the circumstances of the termination of their franchise. And the concern that we have here today is that the order the court may enter with regard to the matters I have referred to may have a negative effect on the Squires' ability to assert those claims.

To get to the point, we are then confronted with the condition that the other teams have settled apparently or

proposed to settle and the league has settled and we are left here alone. What we would propose to do and would ask the court for permission to do would be to make a motion under Rule 412A for a voluntary dismissal under certain terms and conditions and be given an opportunity to make that motion. What we would in effect hope to accomplish is the preservation of the claims that we have, we, the Squires, have, that I have referred and they may include claims that are already in the action or that might have been able to have been asserted in the action.

So recognizing the practicalities of this matter, and I am talking about the practicalities that there are players concerned, there are other teams concerned and there are other entities and individuals in the world other than those that merely compromise the Squires and their limited partners and general partner, what we would like to do is take action in the lawsuit that will in effect preserve our rights, preserve our position and condition and in effect allow those parties in the condition we are in to go forward if that's the case.

THE COURT: What you had better do, if that's your issue, file whatever papers you want to file so they can be answered.

MR. SCHWARTZ: We would like to do that.

BEST COPY AVAILABLE

THE COURT: File whatever papers you wish. When are you prepared to file them?

MR. SCHWARTZ: What I propose is this: I would like to file the papers 30 days after any order is entered with regard to the settlement of the action. The reason for that, your Honor, is --

THE COURT: That's fine but then I will throw it out because it's moot.

MR. SCHWARTZ: What we think will happen here is if all these matters are resolved, and there are only one or two or three matters before the court, the court might be readily able to grant a voluntary dismissal, the effect of which would be to remove this claim and any claims we have in the action and we will assert them to --

THE COURT: It's up to you. If you want to file it 30 days after the settlement, that's fine. But I indicated to you that my initial impression is if you do that, the probability is that you expose yourself to a dismissal on the ground of mootness.

MR. SCHWARTZ: May I amplify on what I said one more minute? We don't want to interpose an objection to that which is already a fait accompli.

THE COURT: Then I don't understand what your position is.

MR. SCHWARTZ: What has happened here is the Squires in effect were excluded from the merger. The Squires were not permitted to go forward in this merged league as an expansion team. The Squires are a public company, one of the very few professional teams that are publicly owned.

In order for the Squires to have gone forward what they would have had to have done, as they did when they became viable, they got an exemption from the Virginia Squires commission to sell shares to the public. People acquired ownership in the Squires. When we were excluded and unable to raise funds the effect of it was we were put out of business. It has been said that we folded. We didn't fold. We went through the season and were prepared to go into the expanded league.

THE COURT: Well, do what you suggest and I will certainly give you and you certainly have permission to file whatever papers you want to file 30 days after the matter is settled.

MR. SCHWARTZ: But I am only addressing the reservation of our claims in this action and as a result of the merger and termination. In effect I am saying under those circumstances we would, if we were permitted to have this voluntary dismissal, we are fully prepared

and will do so today, represent to the court, that we withdraw any objection to the lifting of the injunction, to the conclusion of the settlement agreement because those matters are really a fait accompli. Our claims are something different.

THE COURT: All right.

MR. SCHWARTZ: What we are asking is the court to give us that opportunity.

THE COURT: When all the matters have been concluded, you want an opportunity 30 days thereafter to file whatever motions you feel will be appropriate.

MR. SCHWARTZ: The matters regarding the settlement of the action, yes. When those matters have been concluded, and I am talking about the settlement of the Robertson action and the settlement embodied in these agreements, to give us to negotiate a settlement, if no settlement were forthcoming, then commence any action we deed is appropriate.

THE COURT: You may file whatever motions in this court that you feel are appropriate 30 days after all these matters have been put together. That's agreeable to me.

MR. FURTH: In view of Mr. Schwartz' appearance may I be relieved of my responsibilities with regard to

Virginia?

THE COURT: I think what you have to do, Mr. Furth, and you know our rules, you file an affidavit and you will be relieved.

Anything further, gentlemen?

MR. SCHWARTZ: Until we learn what the circumstances of Mr. Furth's firm's relationship and retainer situation were with regard to all of these matters in this action we would not yet consent to be substituted. I don't know enough about it to consent to the motion he is making. We are appearing today because he sent a letter here to have independent counsel to address the question of lifting the injunction and this settlement agreement.

MR. FURTH: I find I no longer can represent these clients now that they have conflicts, and so I will file my affidavit.

THE COURT: I suppose you are looking at the time because you are going back to San Francisco today. If all the matters involving you have been concluded you may go.

MR. FLOURNOY: Your Honor, I don't believe they have been. My name is Peter Flournoy and I represent San Diego Professional Basketball Corporation especially

EXHIBIT E TO AFFIDAVIT OF FURTH

PROOF OF SERVICE BY MAIL

I, Kathy Ely, certify and declare under penalty of perjury that I: am a citizen of the United States; am over the age of 18 years; am employed by Furth, Fahrner & Wong, at the address indicated, whose members are members of the State Bar of California and at least one of whose members is a member of the bar of each Federal District Court within California; am not a party to or interested in the cause entitled upon the document to which this Proof of Service is affixed; and that I served a true and correct copy of the following document(s):

1. Notice of Application To Withdrew As Counsel For Cross-Claimants

2. Affidavit of Frederick P. Furth

by today depositing, at San Francisco, California, the said document(s) in the United States Mail in a sealed envelope, with first-class postage thereon fully prepaid, addressed to:

Michael H. Goldberg, Esq.
American Basketball Association
1700 Broadway
New York, New York 10019

Robert S. Carlson, Esq.
Spengler, Carlson, Gubar & Churchill
280 Park Avenue
New York, New York 10017

Sommer, Tinkham, Barnard, Freiberger & Scopelitis
815 Merchants Bank Building
Indianapolis, Indiana 46204

Kazlow & Kazlow
10 East 40th Street
New York, New York 10016

Richard Phillips, Esq.
1622 Locust Street
Philadelphia, Pennsylvania 19103

Bill, Betts & Nash
One World Trade Center
Suite 5215
New York, New York 10048

Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

Proskauer, Rose, Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Avenue
New York, New York 10017

Watson, Leavenworth, Kelton & Taggart
100 Park Avenue
New York, New York 10017

See Attached Exhibit A

DATED: January 10, 1977
San Francisco, California

Kathy Ely

FURTH, FAHRNER & WONG
ATTORNEYS AT LAW
ROSS BUILDING, SUITE 1300
SAN FRANCISCO, CA 94104
TELEPHONE 433-2626

EXHIBIT E TO AFFIDAVIT OF FURTH

EXHIBIT A

Dodge, Friend, Wilson & Spedale
1535 First National Bank of
Commerce Building
New Orleans, Louisiana 70112

Bember, Wolf & Curtis
19 West 44th Street
New York, New York 10036

Boone, Schatzel, Hamrick & Knudsen
235 Montgomery Street, Suite 420
San Francisco, California 94104

Dale Schreiber, Esq.
Schwartz, Halperin & Schreiber, P.C.
285 Madison Avenue
New York, New York 10017

Peter Flournoy, Esq.
3681 Fifth Avenue
San Diego, California 92103

Stephen V. Bomse, Esq.
Heller, Ehrman, White & McAuliffe
44 Montgomery Street
San Francisco, California 94104

Herbert Solomon, Esq.
Kirkind, Sterlin & Solomon
1200 Third Avenue
Suite 1400
San Diego, California 92101

Dr. Leonard Bloom
110 West "C" Street
Suite 2200
San Diego, California 92101

Hugh L. Patterson, Esq.
Willcox, Savage, Lawrence
Dickson & Spindle
Virginia National Bank Building
Suite 1800
Norfolk, VA 23510

Frank M. Goldberg
1231 Camino Del Rio South
San Diego, California 92108

Van Cunningham
Stewart Sandwiches, Inc.
5732 Curlew Drive
Norfolk, VA 23502

Mr. R.T. Eckles
Trustee in Bankruptcy
for Mountain States Sports
2500 First of Denver Building
Denver, Colorado 80202

FURTH, FAHRNER & WONG
RUSS BUILDING, SUITE 1330
SAN FRANCISCO, CA 94104
TEL (415) 391-2070

AFFIDAVIT OF CARLSON

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

OSCAR ROBERTSON, et al., :

Plaintiffs, : 70 Civ. 1526 (RLC)

-against- : AFFIDAVIT

NATIONAL BASKETBALL ASSOCIATION, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT S. CARLSON, being duly sworn, deposes and says:

1. I am a member of the firm of Spengler Carlson Gubar Churchill & Brodsky, and I am submitting this affidavit on behalf of American Basketball Association, Long Island Sports, Denver Nuggets, Inc., San Antonio Spurs Professional Basketball, Ltd. and Indiana Pacers, L.P. in support of the motion by Furth, Fahrner & Wong to be relieved as counsel for the remaining cross-claimants in the above-captioned action.

2. On December 23, 1976, after the Hyannis settlement of the Robertson case, Judge Zirpoli, in American Basketball Association, et al. vs. National Basketball Association, et al., United States District Court, Northern District of California (Civ. No. 51055), relieved Furth, Fahrner & Wong as counsel for the American Basketball Association and its member teams, including R. T. Eckles, Trustee in Bankruptcy for Mountain States, Inc.,

d/b/a Utah Stars ("Utah Stars"). In that action the American Basketball Association and its member teams (including the Utah Stars) had filed an antitrust complaint against the National Basketball Association and its member teams which alleged a conspiracy to restrain trade and monopolize interstate commerce in the sport of professional basketball which was designed to destroy the American Basketball Association. It was the same conspiracy as is alleged in the cross-claims in the instant case.

3. I am attaching hereto as Exhibit "A" a copy of the order of Judge Zirpoli relieving the Furth firm as counsel to the Utah Stars and other ABA teams in the California action. The Court will note the findings of fact made by Judge Zirpoli in that order:

> "As a result of the aforesaid compromise and settlement of certain plaintiffs and certain of their successors in interest, a conflict has developed vis a vis the continued representation of plaintiffs by Frederick P. Furth and Furth, Fahrner & Wong and William C. Barnard and Sommer, Tinkham, Barnard & Freiburger;
>
> The interests of justice, therefore, require that the Court relieve Furth, Fahrner & Wong, Frederick P. Furth and Daniel S. Mason and Sommer, Tinkham, Barnard & Freiberger and William C. Barnard as counsel of record to all plaintiffs."

4. The transcript of the hearing during which Mr. Furth was relieved is very illuminating for it demonstrates that Utah Stars, by its counsel in California, Stephen Bomse, urged the same argument as it urges here:

> "Mr. Bomse: Your Honor, obviously we are going to take up these issues in any way that the Court directs us to, but the problem I have in doing it

is that in going into what are the merits of these positions, we are ignoring what is our fundamental position here, which is that my clients, for whom I am appearing specially here, have counsel, and that counsel should be doing all of this.

The Court: Who is that?

Mr. Bomse: Mr. Furth.

The Court: Well, there is clear conflict here, isn't there? How can I ask Mr. Furth to act under these circumstances?"

* * * * *

"The Court: Well, I am satisfied that there is such a conflict there that it would be entirely improper for me to continue Mr. Furth as counsel for the plaintiffs. He represented the ABA and named plaintiffs at the request and direction of the Trustees of the ABA. Is that what you call them? And the Commissioner. Any having been delegated to exercise this responsibility, he did so, I assume, at the time without for one moment believing that this type of conflict would arise. So that we would have to say that his representation at that time of all plaintiffs, the ABA and the Commissioner and the Trustees, was a good-faith representation.

It subsequently developed that this litigation is in a sense settled by reason of that settlement,

except for certain parties who now make claims, on the theory that they are not bound thereby, or that the terms and conditions are such that the agreement is a nullity. There are others who have dismissed, a substantial number of them. And now Mr. Furth finds himself in a very definite conflict. He cannot have representative people who dismissed and who are anxious to have all of this litigation terminated themselves, and at the same time represent the people who don't want it terminated."

5. I am attaching hereto as Exhibit "B" a copy of the transcript of the proceeding before Judge Zirpoli. It seems to me that having made the argument once that Mr. Furth should not be relieved in an identical litigation, the Utah Stars should not be heard to raise the same argument again.

6. As this Court itself observed during the hearing on September 8, 1976 with respect to the motion to dissolve the preliminary injunction in this action when the question of Frederick P. Furth's continuation as counsel came up:

"The Court: What you are telling me, what the reality is, if the ABA and these other clubs settle and Mr. Furth is counsel, the probability is that he would not be able, having represented the ABA which has now settled, he probably would not be in a position to represent any contending club under any circumstances, not in this court. If he were to attempt to represent I think there

would be a motion made in regard to the conflict of interest so that problem is put aside,but it appears to me that your action, if you want to maintain it and pursue it, remains."

* * * * *

"The Court: I don't know what that is. I don't know what the terms of that are, but let me put it to you this way: I think it would be very difficult in my judgment for Mr. Furth, having represented the ABA and the ABA having settled this litigation and being a party to the settlement and approving the settlement and so forth, I think Mr. Furth would be in a very difficult position without the indemnification to pursue this litigation on behalf of any member team. I think he would be."

* * * * *

"The Court: I am saying to you that Mr. Furth having represented the ABA, which is the overall entity that has settled and wants out of the litigation, that without the indemnification I think Mr. Furth would have a difficult position to attempt to represent you and to continue this lawsuit."

7. I respectfully suggest that the position of the Utah Stars in this motion is incorrect. The settlement discussions took place and agreement in principle was reached during the month of June, 1976 in Hyannis, Massachusetts. During those discussions I was present as counsel for the ABA, the New York

Nets, San Antonio Spurs, Indiana Pacers and the Denver Rockets. Mr. Furth was not present and did not participate in such discussions. Upon my return from Hyannis, I spoke both to Mr. Furth and Mr. Mason in Mr. Furth's office advising them that a conflict of interest had been created by settlement of the Robertson cross-claims and that, in my view, Mr. Furth could no longer represent plaintiffs in this action nor any of the cross-claimants in Robertson. I instructed Mr. Furth on behalf of my clients to take no further action. The conflict, in my view, was created by the settlement and the shifting allegiance of the Nets, Nuggets, Spurs and Pacers rather than the agreement of the ABA teams to indemnify the NBA from certain claims. Upon joining the NBA, the Nets, Nuggets, Pacers and Spurs became party to a Joint Venture Agreement to which all NBA teams are party. I am attaching hereto as Exhibit "C" a copy of such Joint Venture Agreement which in salient part provides:

> "The net losses of the Joint Venture shall be chargeable in the same proportion as the capital contributions made on the basis of gross gate receipts, up to the amount of such contributions. Thereafter any net losses of the Joint Venture shall be chargeable equally to each of Joint Venturers."

8. The Joint Venture Agreement by its terms is governed by the law of the State of New York. Under New York law, as the Court knows, joint ventures are in the nature of partnerships and are governed by partnership law. Under the New York Partnership Act, each partner is jointly and severally liable for the

wrongful acts of any partner acting in the course of partnership business. It is manifestly impossible, therefore, for Mr. Furth to continue to represent some of his ABA clients against others of his former ABA clients with respect to the same matter.

9. I would also note that two of the remaining cross-claimants here (the Virginia Squires and the San Diego Conquistadors) have already sued my clients. These suits, in and of themselves, create another conflict for Mr. Furth making his continued representation here impossible.

Robert S. Carlson
ROBERT S. CARLSON

Sworn to before me this
23rd day of February, 1977.

Marie Stasiuk
Notary Public

MARIE STASIUK
Notary Public, State of New York
No. 41-3315923
Qualified in Queens County
Commission Expires March 30, 1977

EXHIBIT A TO AFFIDAVIT OF CARLSON

ORIGINAL
FILED
DEC 23 1976
WILLIAM L. WHITTAKER
CLERK, U. S. DIST. COURT
SAN FRANCISCO

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMERICAN BASKETBALL ASSOCIATION, et al., Plaintiffs, v. NATIONAL BASKETBALL ASSOCIATION, et al., Defendants.	No. 51055 AJZ ORDER
NATIONAL BASKETBALL ASSOCIATION, et al., Counterclaimants, v. AMERICAN BASKETBALL ASSOCIATION, et al., Counterdefendants.	

Furth, Fahrner & Wong (successor to Law Offices of Frederick P. Furth) and Frederick P. Furth and Daniel S. Mason and Sommer, Tinkham, Barnard & Freiberger and William C. Barnard having applied for an order relieving them as counsel to all plaintiffs herein;

And the National Basketball Association defendants having moved for an Order dismissing the Complaint with prejudice;

And the American Basketball Association having moved for an Order dismissing the Counterclaim of Lemat Corporation

with prejudice;

And said matters having come to be heard before the Court on November 22, 1976; the Court makes the following findings and orders:

- Frederick P. Furth and Furth, Fahrner & Wong (successor to Law Offices of Frederick P. Furth) and William C. Barnard and Sommer, Tinkham, Barnard & Freiberger were originally retained as counsel for plaintiffs by the Commissioner of the American Basketball Association, and its Board of Trustees;

- Certain member teams of the American Basketball Association, including certain successors in interest of certain plaintiffs have reached an agreement to compromise and settle this matter with certain defendants and certain of their successors in interest;

- As a result of the aforesaid compromise and settlement by certain plaintiffs and certain of their successors in interest, a conflict has developed vis a vis the continued representation of plaintiffs by Frederick P. Furth and Furth, Fahrner & Wong and William C. Barnard and Sommer, Tinkham, Barnard & Freiberger;

- The interests of justice, therefore, require that the Court relieve Furth, Fahrner & Wong, Frederick P. Furth and Daniel S. Mason and Sommer, Tinkham, Barnard & Freiberger and William C. Barnard as counsel of record to all plaintiffs;

IT IS HEREBY ORDERED:

- Furth, Fahrner & Wong, Frederick P. Furth and Daniel S. Mason, and Sommer, Tinkham, Barnard & Freiberger and William C. Barnard are hereby relieved as counsel for all plaintiffs.

**

**

**

IT IS FURTHER ORDERED:

- The National Basketball Association defendants' motion for an Order dismissing the Complaint with prejudice, and the American Basketball Association's motion for an Order dismissing the Counterclaim of Lemat Corporation with prejudice are continued to January 4, 1977, at 10:00 a.m.

Dated: December 23, 1976
San Francisco, California

ALFONSO J. ZIRPOLI

Alfonso J. Zirpoli
United States District Judge

FURTH, FAIRNER & WONG
RUSS BUILDING, SUITE 1330
SAN FRANCISCO, CA 94104
TEL. (415) 433-2070

EXHIBIT B TO AFFIDAVIT OF CARLSON

Approved as to form:

Frederick P. Furth
Daniel S. Mason
Furth, Fahrner & Wong

William C. Barnard
Sommer, Tinkham, Barnard & Freiberger

By _____
Frederick P. Furth
Counsel for Plaintiffs

Richard J. Archer
John E. Krzywicki
Sullivan Jones & Archer

Proskauer, Rose, Goetz & Mendelsohn

By _____
John E. Krzywicki
Counsel for Defendants except
LEMAT Corporation

Robert L. Dunn
Bancroft, Avery & McAlister

By _____
Robert L. Dunn
Counsel for LEMAT Corporation

Stephen V. Bomse
Heller, Ehrman, White & McAuliffe

By _____
Stephen V. Bomse
Special Counsel for New Orleans
Buccaneers, Inc., Trustee in
Bankruptcy for Mountain States
Sports, Inc. and San Diego
Professional Basketball Corporation

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EXHIBIT B TO AFFIDAVIT OF CARLSON

RECEIVED
6 1976
FAHRNER & WONG

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE: HONORABLE ALFONSO J. ZIRPOLI, SENIOR JUDGE

AMERICAN BASKETBALL ASSOCIATION, ET AL., PLAINTIFFS,	
VS.	CIVIL NO. 51055 AJZ
NATIONAL BASKETBALL ASSOCIATION, ET AL., DEFENDANTS.	

REPORTER'S TRANSCRIPT

MONDAY, NOVEMBER 22, 1976

REPORTED BY: ELDON N. RICH

EXHIBIT B TO AFFIDAVIT OF CARLSON

APPEARANCES:

FOR PLAINTIFF ABA:

ROBERT S. CARLSON, ESQUIRE

FOR DEFENDANT LEMAT CORPORATION:

ROBERT DUNNE, ESQUIRE

FOR REMAINING DEFENDANTS:

MICHAEL CARDOZA, ESQUIRE

FOR RICHARD T. ECCLES, ETC.:

STEPHEN BOMSE; ESQUIRE

FOR SAN DIEGO, NEW ORLEANS AND TRUSTEE FOR MOUNTAIN STATES:

FREDERICK P. FURTH, ESQUIRE
DANIEL S. MASON, ESQUIRE

EXHIBIT B TO AFFIDAVIT OF CARLSON

MONDAY, NOVEMBER 22, 1976

THE CLERK: CIVIL CASE 51055, AMERICAN BASKETBALL ASSOCIATION, ET AL., VERSUS NATIONAL BASKETBALL ASSOCIATION, ET AL., MOTIONS TO DISMISS AND FOR PRETRIAL.

COUNSEL PLEASE STATE THEIR APPEARANCES FOR THE RECORD.

MR. CARDOZA: MICHAEL CARDOZA, PROSKAUER, ROSE, GOETZ & MENDELSOHN, ATTORNEYS FOR ALL THE DEFENDANTS EXCEPT LEMAT CORPORATION.

MR. DUNNE: ROBERT DUNNE, DUNNE, PHELPS & MILLS, FOR THE LEMAT CORPORATION.

MR. BOMSE: STEPHEN BOMSE, HELLER, EHRMAN, WHITE & MC AULIFFE, APPEARING ESPECIALLY FOR RICHARD T. ECCLES, TRUSTEE OF MOUNTAIN STATE SPORTS.

MR. FURTH: FRED FURTH AND DAN MASON, YOUR HONOR. THE STATUS OF OUR APPEARANCES --

THE COURT: WHICH ONES DO YOU REPRESENT?

MR. FURTH: SAN DIEGO, NEW ORLEANS AND THE TRUSTEE FOR MOUNTAIN STATES, WHICH WAS UTAH --

THE COURT: WHICH WOULD BE ALL THREE. ALL RIGHT.

MR. CARLSON: ROBERT S. CARLSON, SPECIAL COUNSEL FOR ABA.

THE COURT: ALL RIGHT. IF ANY OF YOU GENTLEMEN IN THE COURSE OF THIS AFTERNOON THOUGHT THAT THE LAST CASE

EXHIBIT B TO AFFIDAVIT OF CARLSON

DISMISSAL, BUT NOW IT'S 1976, AND THE AGREEMENT EXPIRED IN 1974, SO, HA, HA, FELLOWS, YOU ARE OUT OF LUCK." THAT JUST DOESN'T MAKE ANY SENSE.

THE COURT: ALL RIGHT, I WANT TO HEAR FROM COUNSEL.

MR. BOMSE: YOUR HONOR, OBVIOUSLY WE ARE GOING TO TAKE UP THESE ISSUES IN ANY WAY THAT THE COURT DIRECTS US TO, BUT THE PROBLEM I HAVE IN DOING IT IS THAT IN GOING INTO WHAT ARE THE MERITS OF THESE POSITIONS, WE ARE IGNORING WHAT IS OUR FUNDAMENTAL POSITION HERE, WHICH IS THAT MY CLIENTS, FOR WHOM I AM APPEARING SPECIALLY HERE, HAVE COUNSEL, AND THAT COUNSEL SHOULD BE DOING ALL OF THIS.

THE COURT: WHO IS THAT?

MR. BOMSE: MR. FURTH.

THE COURT: WELL, THERE IS CLEAR CONFLICT HERE, ISN'T THERE? HOW CAN I ASK MR. FURTH TO ACT UNDER THESE CIRCUMSTANCES? WHAT YOU OUGHT TO DO, IF YOU FEEL AGGRIEVED IN THAT RESPECT, IS TO FILE A NEW LAWSUIT. YOU CAN CLAIM, IF YOU WANT TO CLAIM, THAT THEY VIOLATED A FIDUCIARY RELATIONSHIP, OR THEY ARE FURTHER PERPETRATING SOME TYPE OF FRAUD OR ANTITRUST VIOLATION; THEN YOU CAN FILE A NEW LAWSUIT. THAT IS WHAT YOU OUGHT TO BE DOING IN THAT RESPECT.

MR. BOMSE: I UNDERSTAND. COULD WE TAKE UP THAT ISSUE NOW? I THINK IT'S VERY IMPORTANT TO THE REST OF THE WAY WE ARE GOING TO PROCEED TODAY.

THE COURT: WHICH ISSUE DO YOU WANT TO TAKE UP NOW?

MR. BOMSE: THE ISSUE OF WHETHER OR NOT WE SHOULD BE FORCED TO PROCEED HERE TODAY OTHER THAN THROUGH MR. FURTH. IT'S THE BASIC ISSUE WHICH OUR MEMORANDA ADDRESSED AT SOME FAIR LENGTH.

THE COURT: WELL, ARE YOU CONCEDING THE OTHERS, FOR LACK OF PROSECUTION, ET CETERA?

MR. BOMSE: NO, YOUR HONOR, NOT AT ALL. INDEED, OUR BASIC POSITION WOULD BE, IF YOUR HONOR RULES AGAINST US IN TERMS OF WHO OUGHT TO BE PROCEEDING FOR THEM -- THEN WE WOULD LIKE TO HAVE ALL THESE MATTERS PUT OVER UNTIL WE CAN GET AS FAMILIAR AS MR. CARDOZA IS, AS FAMILIAR AS MR. FURTH IS, AS FAMILIAR AS MR. CARLSON IS AND AS FAMILIAR AS THE COURT IS. BECAUSE --

THE COURT: WELL, I AM SATISFIED THAT THERE IS SUCH A CONFLICT HERE THAT IT WOULD BE ENTIRELY IMPROPER FOR ME TO CONTINUE MR. FURTH AS COUNSEL FOR THE PLAINTIFFS. HE REPRESENTED THE ABA AND THE NAMED PLAINTIFFS AT THE REQUEST AND DIRECTION OF THE TRUSTEES OF ABA. IS THAT WHAT YOU CALL THEM? AND THE COMMISSIONER. AND HAVING BEEN DELEGATED TO EXERCISE THIS RESPONSIBILITY, HE DID SO, I ASSUME, AT THE TIME WITHOUT FOR ONE MOMENT BELIEVING THAT THIS TYPE OF CONFLICT WOULD ARISE. SO THAT WE WOULD HAVE TO SAY THAT HIS REPRESENTATION AT THAT TIME OF ALL PLAINTIFFS, THE ABA AND THE COMMISSIONER AND THE TRUSTEES, WAS A GOOD-FAITH REPRESENTATION.

IT SUBSEQUENTLY DEVELOPED THAT THIS LITIGATION IS

EXHIBIT B TO AFFIDAVIT OF CARLSON

IN A SENSE SETTLED BY REASON OF THAT SETTLEMENT, EXCEPT FOR CERTAIN PARTIES WHO NOW MAKE CLAIMS, ON THE THEORY THAT THEY ARE NOT BOUND THEREBY, OR THAT THE TERMS AND CONDITIONS ARE SUCH THAT THE AGREEMENT IS A NULLITY. THERE ARE OTHERS WHO HAVE DISMISSED, A SUBSTANTIAL NUMBER OF THEM. AND NOW MR. FURTH FINDS HIMSELF IN A VERY DEFINITE CONFLICT. HE CANNOT HAVE REPRESENTATIVE PEOPLE WHO DISMISSED AND WHO ARE ANXIOUS TO HAVE ALL OF THIS LITIGATION TERMINATED THEMSELVES, AND AT THE SAME TIME REPRESENT THE PEOPLE WHO DON'T WANT IT TERMINATED.

MR. BOMSE: WELL, YOUR HONOR, COULD I BE HEARD ON THAT? BECAUSE WHILE I UNDERSTAND WHAT YOUR HONOR IS SAYING, IT'S THE SAME ARGUMENT THAT IN EFFECT MR. FURTH AND MR. CARLSON MAKE, AND I THINK IT OVERLOOKS A COUPLE OF POINTS.

OUR VIEW IS, IN THE ORDINARY SITUATION WHERE A LAWYER REPRESENTS SEVERAL PLAINTIFFS, IT MAY HAPPEN THAT SOME OF THEM WILL SETTLE. THERE IS NO REASON ON THOSE FACTS ALONE WHY THAT LAWYER HAS ANY CONFLICT OF INTEREST AND CAN'T GO ON REPRESENTING THE OTHER PEOPLE HE IS REPRESENTING. HERE THE ONLY DIFFERENCE IS THAT IN FACT SOME OF THE CLIENTS MR. FURTH REPRESENTED, NAMELY FOUR FRANCHISES IN THE ABA, HAVE NOW GONE AND GOTTEN IN BED, IF I CAN USE THAT COLLOQUIALISM, WITH THE NBA; AND THAT, I SUGGEST, IS ENTIRELY --

THE COURT: WELL, SHOULD HE BE FIGHTING THE NBA FOR CLIENTS OF HIS THAT WENT TO BED WITH THE NBA? SHOULD HE? SHOULD HE DRIVE THEM OUT OF THAT BED?

EXHIBIT B TO AFFIDAVIT OF CARLSON

MR. BOMSE: WHETHER HE SHOULD DO THAT IS A DIFFERENT ISSUE THAN WHETHER OR NOT THOSE CLIENTS WHO DECIDED TO GET IN BED WITH THE NBA IN EFFECT NOW TURN AROUND AND CLAIM THAT HE IS DISQUALIFIED AND THAT WE LOST THE BENEFIT OF WHAT HE HAS BEEN DOING FOR SEVEN YEARS.

THE COURT: I DON'T KNOW WHETHER THEY CLAIM THAT OR DON'T CLAIM IT. MR. FURTH IN GOOD CONSCIENCE SHOULD BE THE ONE WHO SHOULD PRESENT THE MATTER TO THE COURT AND EITHER SEEK TO BE RELIEVED --

MR. BOMSE: WHICH HE HASN'T DONE.

THE COURT: -- OR SEEK SOME GUIDANCE.

MR. BOMSE: WELL, HE HASN'T DONE THAT, YOUR HONOR.

MR. FURTH: YOUR HONOR, I CERTAINLY HAVE, AND THE BASIS OF THE CONFLICT HERE IS NOT, AS HE CLAIMS, THE INDEMNITY AGREEMENT; IT'S THESE CLIENTS -- SOME OF MY CLIENTS ARE NOW IN THE NBA, SOME OF MY CLIENTS ARE OUT OF THE NBA, CLAIMING THEY WANT TO SUE THOSE IN THE NBA. AND I AM IN A CONFLICTING POSITION. I THINK THAT IS WHY YOUR HONOR RELIEVED ME OF MOST OF THE CLIENTS LAST TIME, AS YOU RECALL.

MR. BOMSE: THERE WAS NO OBJECTION AT THAT POINT, YOUR HONOR.

MR. FURTH: WELL, YES, THERE WAS.

THE COURT: I AM CONVINCED THAT THE ANSWER IS REALLY TO RELIEVE MR. FURTH, WHICH THEN BRINGS ME BACK TO THE OTHER QUESTION YOU RAISE, AS TO WHAT IS THE PROPER THING

EXHIBIT B TO AFFIDAVIT OF CARLSON

TO DO TO ENABLE COUNSEL WHO ARE NOT ADEQUATELY PREPARED TO OTHERWISE BE PREPARED TO ANSWER THESE MOTIONS.

MR. BOMSE: YOUR HONOR, ARE YOU SAYING TO ME -- AND I DON'T MEAN TO CONTEST THE COURT IF IT'S FIRM IN ITS RULING, BUT ARE YOU SAYING TO ME THAT THERE IS NO SET OF CIRCUMSTANCES UNDER WHICH YOU WOULD FIND THAT MR. FURTH MIGHT PROPERLY CONTINUE THIS REPRESENTATION? WHAT IF, FOR EXAMPLE -- AND I AM NOT SAYING THESE ARE OR ARE NOT THE FACTS -- WHAT IF, FOR EXAMPLE, IT WAS PERFECTLY CLEAR THAT THE PURPOSE OF THE ABA AND THE NBA IN STRUCTURING THEIR MERGER OR EXPANSION, WHATEVER THEY WANT TO CALL IT, WAS TO CREATE PRECISELY THIS CONFLICT THAT NOW EXISTS?

THE COURT: THEN YOU SHOULD SUE THEM. THAT IS WHAT YOUR ANSWER IS. YOU FILE A NEW CAUSE OF ACTION AGAINST THEM FOR THEIR CONDUCT.

MR. BOMSE: YOUR HONOR, I SUGGEST THAT WE OUGHT NOT TO BE PUT TO THAT KIND OF AN EXTREME TEST. IT SEEMS TO ME --

THE COURT: WELL, I DON'T SEE ANY OTHER ALTERNATIVE.

MR. BOMSE: SEEMS TO ME, YOUR HONOR, THE COURT CAN FIND ONE OF TWO THINGS: ONE, THAT THIS DID NOT CREATE A DISQUALIFYING CONFLICT, OR TWO, THAT THE DISQUALIFYING CONFLICT HAS BEEN WAIVED BY VIRTUE OF THE FACTS. AFTER ALL, THE CONFLICT ALWAYS CAN BE WAIVED, AND I DON'T SEE ANY REASON WHY THE COURT SHOULD NOT LET ME FIND OUT WHAT THE

CIRCUMSTANCES ARE AND ADEQUATELY PRESENT THEM TO THE COURT, AND THEN MAKE UP YOUR MIND WHETHER IN FACT THESE PEOPLE SHOULD BE DEEMED TO HAVE WAIVED THIS CONFLICT.

YOUR HONOR, IT IS A QUESTION, I THINK, OF TREMENDOUS IMPORTANCE -- NOT BECAUSE MR. FURTH IS A UNIQUE LAWYER IN THE SENSE THERE IS NOBODY WHO CAN REPLACE HIM; HE IS A VERIFIED LAWYER, I HAVE THE UTMOST RESPECT FOR HIM. BUT THAT ISN'T THE PROBLEM. THE PROBLEM IS, ON HIS OWN TESTIMONY, HE SPENT LITERALLY THOUSANDS OF HOURS IN PREPARING THIS CASE, HAD IT ALMOST TO TRIAL IN NEW YORK, KNOWS TREMENDOUS AMOUNTS ABOUT IT; HE HAS BEEN AT IT FOR SEVEN YEARS.

NOW HE IS SAYING, "I NEED TO GET OUT OF THE CASE."

THE COURT: WELL, AS I VIEW --

MR. BOMSE: THEN HE DOESN'T EVEN MAKE THAT MOTION, YOUR HONOR. WE ARE IN EFFECT ARGUING AGAINST OURSELVES.

MR. FURTH: I REQUEST TO BE RELIEVED.

THE COURT: I AM SATISFIED HE SHOULD BE RELIEVED, AND THAT THE QUESTION OF EXPANSION CONSTITUTES A SEPARATE OFFENSE -- OR THE QUESTION OF BREACH OF FIDUCIARY DUTY CONSTITUTES A SEPARATE OFFENSE THAT MAY BE ALLEGED IN A NEW COMPLAINT.

UNDER THE CIRCUMSTANCES, I AM RELIEVING HIM, WITH THE OBSERVATION THAT I HAVE JUST MADE, AND YOU WILL HAVE TO TAKE IT FROM THERE AS FAR AS MR. FURTH IS CONCERNED.

WHICH THEN GETS US BACK TO THE QUESTION OF, WHAT

EXHIBIT B TO AFFIDAVIT OF CARLSON

ARE WE GOING TO DO ABOUT THIS MOTION TO DISMISS?

MR. BOMSE: WELL, I WOULD SAY, YOUR HONOR, WHAT WE OUGHT TO DO ABOUT THAT MOTION TO DISMISS IS TO GIVE THE CLIENTS FOR WHOM I AM APPEARING ESPECIALLY TODAY AN OPPORTUNITY, IN EFFECT, TO REGROUP. AND I THINK THAT THAT IS NOT AN UNREASONABLE REQUEST HERE.

THE COURT: WELL, LET ME ASK YOU THIS. I MIGHT BE DISPOSED TO DO THAT, WITH ONE UNDERSTANDING: THAT THE TEST FOR THE MOTION TO DISMISS IS A TEST THAT SHALL BE APPLIED AS OF TODAY, NOT SOME LATER DATE.

MR. BOMSE: THAT SEEMS TO ME PERFECTLY REASONABLE.

THE COURT: IN OTHER WORDS, I DON'T WANT COUNSEL TO COME IN AND SAY, "WELL, NOW, WE HAVE TAKEN A LOT OF TIME AND WE HAVE REGROUPED; AND HAVING REGROUPED, YOUR HONOR HAS TO BEAR IN MIND THAT WE HAVE CAUGHT UP NOW, AND THAT THIS CASE OUGHT TO GO FORWARD." WHETHER THE CASE GOES FORWARD IS DEPENDENT UPON THE CONDITION EXISTING, TRULY EXISTING, AT THE TIME OF THE MOTION.

MR. BOMSE: YOUR HONOR, THAT'S FINE, BECAUSE THAT IS NOT THE PROBLEM.

THE COURT: DO YOU OBJECT TO THAT? I KNOW YOU DO, BUT HOW STRENUOUSLY?

MR. CARDOZA: YOUR HONOR, I THOUGHT THAT AT THE LAST CONFERENCE IN SEPTEMBER MR. FURTH SAID, "DO I HAVE TO

OF TIME, AND IT'S OBVIOUSLY A LITTLE SILLY TO BURDEN ANOTHER FEDERAL COURT.

THE COURT: I THINK THAT'S A REASONABLE REQUEST.

MR. CARDOZA: IF WE COULD JUST REPRESENT TO THE COURT, MR. BOMSE AND I --

THE COURT: YOU CAN REPRESENT TO THE COURT THAT IN VIEW OF THE PREVIOUS STIPULATION, AND UNDER THE CIRCUMSTANCES, THE COURT WOULD RECOMMEND THAT TO THE DEGREE IT'S POSSIBLE TO DO SO, FURTHER ACTION IN THE NEW ORLEANS MATTER BE DEFERRED.

MR. CARDOZA: FINE.

THE COURT: UNTIL RULING BY THE COURT.

MR. CARDOZA: THANK YOU.

MR. BOMSE: I DON'T THINK THAT IS ANY PROBLEM. YOUR HONOR, AS I UNDERSTAND, SO I HAVE THE RULING CLEAR, WITHOUT A MOTION BY MR. FURTH TO BE RELIEVED, YOU ARE IN EFFECT RELIEVING HIM ON THE GROUND OF CONFLICT? IS THAT THE COURT'S RULING?

THE COURT: WELL, I HAVE NEVER INTERPRETED MR. FURTH AS NOT EXPRESSING A DESIRE TO BE RELIEVED. MR. FURTH SORT OF . . . . WELL, HE IS THE MOTIVATING FORCE THAT BROUGHT ABOUT THIS HEARING, ISN'T HE, BEFORE HIS RELIEF?

MR. BOMSE: NO, I DON'T THINK SO.

MR. FURTH: YOUR HONOR, I DON'T UNDERSTAND MR. BOMSE, BECAUSE LAST TIME WHEN I WAS HERE, I ASKED TO BE RELIEVED BECAUSE I HAVE A CONFLICT -- I HAVE CONFLICTING

EXHIBIT B TO AFFIDAVIT OF CARLSON

DEMANDS MADE ON ME.

I APPRECIATE BEING RELIEVED, AND I SHALL PRESENT MR. BOMSE, OR MAKE AVAILABLE TO MR. BOMSE, ANY OF THE FILES.

THE COURT: WELL, I AM RELIEVING YOU BECAUSE YOU HAVE REQUESTED IT, BECAUSE I THINK THE INTERESTS OF JUSTICE DEMAND IT; AND THE ONLY CONDITION THAT I IMPOSE IS THAT YOU SHALL COOPERATE IN EVERY WAY WITH MR. BOMSE BY MAKING AVAILABLE TO HIM ALL THE PAPERS AND FILES IN YOUR POSSESSION.

MR. FURTH: THAT WE SHALL DO, YOUR HONOR.

THE COURT: ALL RIGHT.

THEN YOU WILL HAVE TO PREPARE AN ORDER ACCORDINGLY; AND YOU CAN PREPARE AN ORDER DEFERRING ANY RULING ON THE MOTION TO DISMISS UNTIL THE DATE INDICATED.

NOW THAT BRINGS US BACK TO THE LEMAT COUNTERCLAIM.

MR. DUNNE: WE ARE HERE FOR THE MOTION TO DISMISS FOR LACK OF PROSECUTION.

THE COURT: THEY SAY YOU DIDN'T PROSECUTE DILIGENTLY THERE MAY BE SOME MERIT TO THIS ARGUMENT.

MR. DUNNE: WELL, IF THE COURT PLEASE, I THINK WE SHOULD HAVE THIS OVER AGAIN, THE SAME AS THE OTHER MOTIONS, TO JANUARY.

THE COURT: WHY SHOULD IT GO OVER FOR LEMAT UNTIL JANUARY?

MR. DUNNE: IF THE COURT FINDS THAT --

THE COURT: DIDN'T LEMAT HAVE ITS OWN COUNSEL AT

EXHIBIT B TO AFFIDAVIT OF CARLSON

DISMISSED, THAT WE SHOULD NOT BE DISMISSED.

THE COURT: WELL, BUT DO I ALSO GATHER FROM THAT THAT IF THE OTHER PLAINTIFFS ARE DISMISSED, THEN YOU SHOULD BE DISMISSED?

MR. DUNNE: I DIDN'T REPRESENT THAT TO THE COURT, YOUR HONOR. WE WOULD EXPECT TO CONTINUE PROSECUTION OF THE COUNTERCLAIMS.

THE COURT: THEN MAYBE I OUGHT TO PERMIT THEM TO CONTINUE AGAINST YOUR CLIENT ALONE, AND THEN YOU CAN CARRY YOUR CROSSCLAIM AGAINST THEM.

MR. CARLSON: YOUR HONOR --

MR. DUNNE: WE WOULD HAVE TO CONSIDER AT THAT TIME WHAT TO DO IN THAT CIRCUMSTANCE, YOUR HONOR.

I DON'T HAVE ANY RESPONSE; I HADN'T THOUGHT OF IT.

MR. CARLSON: I AM AMENABLE, YOUR HONOR, TO AN ADJOURNMENT UNTIL THE FIRST TUESDAY IN JANUARY, WITH THE SAME UNDERSTANDING, THAT ANY EVENTS WHICH TRANSPIRE BETWEEN NOW AND THEN SHALL NOT BE DEEMED TO PREJUDICE MY POSITION.

THE COURT: OH, YES, THAT'S CLEARLY UNDERSTOOD.

MR. DUNNE: THAT'S UNDERSTOOD.

THE COURT: ALL RIGHT, YOU MAY PREPARE AN ORDER ACCORDINGLY.

MR. BOMSE: YOUR HONOR, JUST ONE MORE MOMENT, IF I COULD. I AM A LITTLE CONFUSED WITH THE PROCEDURAL WAY THIS HAS COME UP WITHOUT MR. FURTH'S MAKING A MOTION. AS I

EXHIBIT B TO AFFIDAVIT OF CARLSON

UNDERSTAND THE SITUATION, MR. FURTH HAS A CONFLICT OF INTEREST, YET HE APPEARS TO BE PURPORTING TO ACT ON BEHALF OF ABA; AND IT SEEMS TO ME THAT IT HAS A CONFLICT GOING ONE WAY, HE OUGHT TO HAVE A CONFLICT GOING THE OTHER.

THE COURT: THE FACT OF THE MATTER IS, AT THE LAST HEARING I DISMISSED MR. FURTH AS COUNSEL IN ALL THOSE CASES WHERE DISMISSALS HAD BEEN ENTERED.

I DEFERRED HIS DISMISSAL AS COUNSEL AT HIS REQUEST, EVEN THOUGH IT MAY BE AN ORAL REQUEST, OF WHICH YOU HAD NOTICE.

MR. BOMSE: YES, YOUR HONOR.

THE COURT: TO THIS DAY. THE MATTER HAVING COME BEFORE ME THIS DAY, HAVING REVIEWED ALL THE FACTS AND CIRCUMSTANCES, I HAVE CONCLUDED THAT HIS ORAL REQUEST, IN THE INTERESTS OF JUSTICE, CALL FOR A DISMISSAL OF MR. FURTH AS COUNSEL.

MR. BOMSE: I UNDERSTAND THAT, YOUR HONOR, BUT MY PROBLEM IS, IF HE HAS A CONFLICT WHICH PRECLUDES HIM FROM REPRESENTING MY THREE CLIENTS, WHY DOES HE NOT HAVE AN EQUAL CONFLICT WHICH HAS PRECLUDED HIM FROM REPRESENTING THE ABA? JUST SEEMS TO ME THAT --

THE COURT: I DON'T THINK HE REPRESENTS THEM ANY FURTHER.

MR. BOMSE: WELL, YOUR HONOR, THE COURT HAS PAPERS FILED AS LATE AS LAST WEEK ON HIS FIRM'S STATIONERY.

EXHIBIT B TO AFFIDAVIT OF CARLSON

THE COURT: WELL, ALL RIGHT, HE WILL HAVE TO WITHDRAW AS REPRESENTING THE ABA IN THIS LITIGATION.

MR. FURTH: I HEREBY WITHDRAW, YOUR HONOR.

WE HAD FILED SOME PAPERS.

THE COURT: YOU ARE OUT OF IT ALTOGETHER.

MR. FURTH: I AM OUT OF IT ALTOGETHER, YOUR HONOR. WE SHALL NOT BE IN COURT AGAIN ON THIS MATTER.

THE COURT: BEG PARDON?

MR. FURTH: WE SHALL NOT BE IN COURT AGAIN ON THIS MATTER.

THE COURT: I DIDN'T HEAR THAT PART WHERE YOU SAID "ON THIS MATTER." ALL RIGHT.

(LAUGHTER.)

MR. CARDOZA: YOUR HONOR, WILL YOU INDULGE ME ONE MORE MINUTE? WOULD IT BE AT ALL POSSIBLE TO SCHEDULE THE HEARING ON JANUARY 4TH IN THE MORNING? BECAUSE WE COME FROM NEW YORK FOR AN AFTERNOON HEARING AND WE REALLY LOSE ABOUT THREE DAYS WORTH OF TRAVELING TIME. IF IT'S NOT POSSIBLE --

THE COURT: JANUARY 4TH AT 10:00 A.M., MR. HOM.

THE CLERK: YES, YOUR HONOR.

MR. CARDOZA: I APPRECIATE THAT.

THE COURT: I THOUGHT YOU WERE LOCAL COUNSEL.

MR. CARDOZA: NO, YOUR HONOR, MR. ARCHER IS LOCAL COUNSEL -- OF SULLIVAN, JONES & ARCHER; BUT I FELT SINCE WE WERE TALKING ABOUT THE HISTORY --

ELDON N. RICH
OFFICIAL REPORTER, U. S. DISTRICT COURT
SAN FRANCISCO, CALIF. 94103

EXHIBIT C TO AFFIDAVIT OF CARLSON

AGREEMENT made as of the 16th day of May, 1974 among

ATLANTA HAWKS BASKETBALL, INC., a corporation having an office at 100 Techwood Drive, N.W., Atlanta, Georgia 30303,

CAPITAL BULLETS BASKETBALL CLUB, INC., a corporation having an office at Capital Centre, One Harry S. Truman Drive, Landover, Maryland 20786,

BOSTON CELTICS BASKETBALL CLUB, INC., a corporation having an office at Boston Garden, North Station, Boston, Massachusetts 02114,

BUFFALO BRAVES, INC., a corporation having an office at Memorial Auditorium, Main and Terrace, Buffalo, New York 14202,

THE CHICAGO PROFESSIONAL SPORTS CORPORATION, a corporation having an office at 333 North Michigan Avenue, Suite 1325, Chicago, Illinois 60601,

CLEVELAND PROFESSIONAL BASKETBALL COMPANY, a corporation having an office at 3717 Euclid Avenue, Cleveland, Ohio 44115,

DETROIT PISTONS BASKETBALL CLUB, a division of Zollner Corporation, having an office at Cobo Arena, One Washington Boulevard, Detroit, Michigan 48226,

TEXAS PRO SPORTS, INC., a corporation having an office at 3930 Kirby Drive, Suite 165, Houston, Texas 77006,

KINGS PROFESSIONAL BASKETBALL CLUB, INC., a corporation having an office at 210 West 14th Street, Kansas City, Missouri 64105,

CALIFORNIA SPORTS INCORPORATED, a corporation having an office at P.O. Box 10, Inglewood, California 90306,

MILWAUKEE PROFESSIONAL SPORTS & SERVICES, INC., a corporation having an office at 901 North Fourth Street, Milwaukee, Wisconsin 53203,

MADISON SQUARE GARDEN CENTER, INC., a corporation having an office at Four Pennsylvania Plaza, New York, New York 10001,

RIKO ENTERPRISES, INC., a corporation having an office at The Spectrum, Broad Street and Pattison Avenue, Philadelphia, Pennsylvania 19148,

EXHIBIT C TO AFFIDAVIT OF CARLSON

PHOENIX PROFESSIONAL BASKETBALL CLUB, a limited partnership having an office at P. O. Box 1369, Phoenix, Arizona 85001,

PRO BASKETBALL, INC., a corporation having an office at Suite 380, Lloyd Building, 700 Northeast Multnomah Street, Portland, Oregon 97232,

SAN FRANCISCO WARRIORS, a limited partnership having an office at 556 Golden Gate Avenue, San Francisco, California 94102,

FIRST NORTHWEST INDUSTRIES OF AMERICA, INC., a corporation having an office at 221 West Harrison, Seattle, Washington 98119 and

NEW ORLEANS PROFESSIONAL BASKETBALL CLUB, a general partnership, having an office at Suite 244, United California Bank Building, 9601 Wilshire Boulevard, Beverly Hills, California 90210.

The four entities listed on Exhibit A.

WHEREAS, the parties hereto have been, and are, Joint Venturers in a joint venture conducted under the name of the National Basketball Association (hereinafter sometimes referred to as the "Joint Venture"); and

WHEREAS, an agreement evidencing such Joint Venture was executed as of June 1, 1966; and

WHEREAS, various parties have withdrawn from the Joint Venture and others have since joined it; and

WHEREAS, the parties continue to desire (i) to maintain their relationship as Joint Venturers under the name of the National Basketball Association, (ii) to define the terms of the relationship, and (iii) to maintain their agreement to writing,

NOW, THEREFORE, it is mutually agreed as follows:

BEST COPY AVAILABLE

EXHIBIT C TO AFFIDAVIT OF CARLSON

ARTICLE I - Name and Place of Venture

1.1 The name of the Joint Venture shall be the National Basketball Association.

1.2 The principal location of the Joint Venture shall be at 2 Pennsylvania Plaza, New York, New York 10001 and at such other locations within or without the State of New York as may be chosen by the Joint Venture.

ARTICLE II - Purpose of Venture

2.1 The Joint Venture shall consist of professional basketball teams, each of which shall be operated by a Joint Venturer. The Joint Venturers shall use their best efforts to see to it that the sport of professional basketball is conducted according to the highest moral and ethical standards.

ARTICLE III - Capital Contributions, Accounts and Withdrawals

3.1 The capital of the Joint Venture shall consist of such sums as shall be contributed to capital by each of the Joint Venturers in accordance with the provisions of the Constitution of the Joint Venture.

3.2 An individual capital account shall be maintained for each Joint Venturer.

3.3 Unexpended capital contributions shall be subject to withdrawal only on withdrawal from the Joint Venture in accordance

with the Constitution.

ARTICLE IV - Net Income and Losses

4.1 For accounting purposes, an individual income account shall be maintained for each Joint Venturer. Any net income or losses shall be credited or debited to the individual income accounts as soon as practicable after the close of each fiscal year.

4.2 The net income, if any, of the Joint Venture shall be credited equally to the income account of each of the Joint Venturers.

4.3 The net losses of the Joint Venture shall be chargeable in the same proportion as the capital contributions made on the basis of gross gate receipts, up to the amount of such contributions. Thereafter any net losses of the Joint Venture shall be chargeable equally to each of Joint Venturers.

4.4 If there be no credit balance in the individual income accounts, net losses shall be debited to the individual capital accounts. If the capital account of a Joint Venturer shall have been depleted by the debiting of losses under this paragraph, such capital account shall be restored in accordance with the provisions of the Constitution.

4.5 The fiscal year of the Joint Venture shall end on May 31st in each year.

ARTICLE V - Term of Agreement: New Joint Venturers

5.1 Except as provided in Section 5.2 below, this Agreement shall continue in effect until May 31, 2050, and shall thereafter continue for successive periods of one year each unless prior to three months before the closing of any such period notice to the contrary is sent by an Joint Venturer to all the other Joint Venturers.

5.2 The withdrawal of a Joint Venturer or the admission of a New Joint Venturer in accordance with the Constitution shall dissolve the Joint Venture, and shall cause the immediate commencement of a new Joint Venture, but shall have no effect upon the continuance of the activities of the Joint Venture, unless the Joint Venturers elect in accordance with said Constitution not to continue the activities of the Joint Venture. Absent such election, the remaining Joint Venturers, together with any new Joint Venturers which may be added in accordance with the Constitution, shall continue the activities of the new Joint Venture. Until the execution of a new Joint Venture Agreement, the terms and provisions of this Agreement shall continue in effect and shall govern the relationship between the then members of the Joint Venture.

5.3 The Joint Venturers continuing the activities of the Joint Venture shall succeed to all the assets, liabilities and capital of the Joint Venture, except as the same may be distributable to any Joint Venturer withdrawing.

ARTICLE VI - Constitution, By-Laws and Miscellaneous

6.1 The affairs of the Joint Venture shall be conducted in accordance with this Agreement and with the provisions of the Constitution and By-Laws of the Joint Venture.

6.2 Proper and complete books of account shall be kept at all times and shall be open to the inspection of each of the Joint Venturers.

6.3 All the terms and conditions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

6.4 This Agreement shall be construed and enforced in accordance with the laws of the State of New York.

6.5 This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have hereunto caused this Agreement to be executed as of the day and year first above mentioned.

ATLANTA HAWKS BASKETBALL, INC.

By /s/ John W. Wilcox, Jr.
President

CALIFORNIA SPORTS INCORPORATED

By /s/ Jack Kent Cooke

CAPITAL BULLETS BASKETBALL CLUB, INC.

By /s/ Abe Polin

MILWAUKEE PROFESSIONAL SPORTS & SERVICES, INC.

By /s/ William H. Alverson

EXHIBIT C TO AFFIDAVIT OF CARLSON

BOSTON CELTICS BASKETBALL CLUB, INC.

By /s/ Robert Schmertz
Chmn. of Bd.

BUFFALO BRAVES, INC.

By /s/ Paul L. Snyder

THE CHICAGO PROFESSIONAL SPORTS CORPORATION

By /s/ Philip M. Kutznick, Pres.

CLEVELAND PROFESSIONAL BASKETBALL COMPANY

By /s/ Nick J. Mileti

DETROIT PISTONS BASKETBALL CLUB, a division of Zollner Corporation

By /s/ Paul O. Schirmeyer,
Treasurer

TEXAS PRO SPORTS, INC.

By /s/ Irvin Kaplan

KINGS PROFESSIONAL BASKETBALL CLUB, INC.

By /s/ Joseph A. Avelson
President

SPURS PROFESSIONAL BASKETBALL CLUB, LTD.

By [signature]
Concessions, Inc., its General Partner, by Its Attorney-in-Fact

LONG ISLAND SPORTS (a limited partnership)

By [signature]
By Robert [signature]
Attorney in Fact

MADISON SQUARE GARDEN CENTER, I

By /s/ Edward S. Irish
Vice-President

RIKO ENTERPRISES, INC.

By /s/ Nathaniel Budin

PHOENIX PROFESSIONAL BASKETBALL CLUB, a Limited Partnership, acting through a General Partner, DRO [illegible] CORPORATION

By /s/ Richard L. Bloch, Presid

PRO BASKETBALL, INC.

By /s/ Herman Sarkowsky
Pres.

SAN FRANCISCO WARRIORS

By /s/ Franklin Mieuli

FIRST NORTHWEST INDUSTRIES OF AMERICA, INC.

By /s/ Zollie Volchok, VP

NEW ORLEANS PROFESSIONAL BASKETBALL CLUB

By /s/ Fred M. Rosenfeld

DENVER NUGGETS, INC.

By [signature], Exec. Com.

INDIANA PACERS L.P.

By [signature]
Arena Sports, Inc., its General Partner, by
JAMES L. WALKER, SECRETARY-TREASURER

7

EXHIBIT C TO AFFIDAVIT OF CARLSON

EXHIBIT A

SPURS PROFESSIONAL BASKETBALL CLUB, LTD., a Texas limited partnership, Hemisfair Plaza, P.O. Box 530, San Antonio, Texas 78292

INDIANA PACERS L.P., an Indiana limited partnership, 151 North Delaware Street, Indianapolis, Indiana 46204

DENVER NUGGETS, INC., a Denver corporation, 1635 Clay Street, Denver, Colorado 80204

LONG ISLAND SPORTS, a New York limited partnership, 1 Old Country Road, Carle Place, New York 11515

EXHIBIT M TO AFFIDAVIT OF CARDOZO

STEPHEN V. BOMSE
HELLER, EHRMAN, WHITE & McAULIFFE
44 Montgomery Street
San Francisco, California 94104

Telephone: (415) 981-5000

Special Counsel appearing for purposes of this matter only on behalf of Richard T. Eckles, Trustee in Bankruptcy for Mountain State Sports, Inc.; San Diego Professional Basketball Corporation and New Orleans Buccaneers, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMERICAN BASKETBALL ASSOCIATION, et al., Plaintiffs, vs. NATIONAL BASKETBALL ASSOCIATION, et al., Defendants.	NO. 51055 (AJZ) MEMORANDUM OF CERTAIN PLAINTIFFS IN OPPOSITION TO MOTION TO DISMISS AND ORDER TO SHOW CAUSE RE DISMISSAL

This Memorandum is submitted by three former members of the American Basketball Association ("ABA") in opposition to a motion by defendants to dismiss this antitrust action. The Memorandum is being submitted by Special Counsel to these franchises and not -- as we believe it should be -- by the attorneys who have represented them and their former joint venturers in the ABA in various actions against the National Basketball Association over several years and in several different forums. The reason for this present reluctance by their counsel is that there is now a supposed conflict among these former co-parties resulting from the fact that four former ABA teams have recently been added

to the NBA.

As one condition of being given that opportunity, these four teams not only had to agree to dismiss their claims against the NBA, but also agreed to indemnify the NBA*/ against all litigation expenses and liabilities to other ABA teams. As respects two other former ABA franchises -- Kentucky and St. Louis -- that is no problem since they were each apparently paid $3 million in connection with the so-called "expansion" to go quietly out of the professional basketball business. However, the three franchises now before the Court -- who formerly operated in Salt Lake City, San Diego and New Orleans but who were forced out of business before the merger**/ -- were paid nothing. They are therefore very much interested in pursuing what they believe (and have been led by their long-time counsel to believe) are meritorious claims against the NBA. In pursuing those claims, they want

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*/ For convenience, reference to the "NBA" is to the league and its constituent members, unless otherwise noted.

**/ Both the NBA and the ABA resolutely resist using the term "merger," preferring to describe what has recently occurred as an "expansion." Call it what they will, the fact is that there used to be two competitive professional basketball leagues and now there is only one.

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to continue to be represented by their present attorneys who are not only highly respected members of the antitrust bar but who, more importantly, have been deeply involved on their behalf in litigation against the NBA for several years.

The lawyers, however, now claim a conflict of interest and apparently seek to withdraw from the litigation. How, they ask, can they continue to represent some of their plaintiff-clients when others have not only settled but have agreed to indemnify the defendants against liability in the very litigation in question?

The answer, we submit, is "without difficulty." Even assuming that counsel had nothing to do with the creation of the asserted conflict -- and we presently have no evidence one way or the other on that issue -- the fact is that the ABA and its member teams should not be permitted to create a disqualifying conflict against the interests of their former co-venturers and co-plaintiffs and then use that conflict as a basis for denying plaintiffs the continuing services of the lawyers upon whom they have relied for seven years.

At the very least, even if there were found to be a conflict, it should be deemed waived in favor of the remaining franchise-litigants. After all, it is not the settlement which creates the alleged conflict but the curious */ agreement of the ABA teams to indemnify the NBA against further litigation

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*/ We say "curious" because the basis upon which the NBA and ABA sought approval of the merger was that the remaining ABA teams were on the verge of financial collapse and

liability or expense. There is no reason why that fact should be permitted to disqualify plaintiffs' counsel. If the settling parties chose to (or were required by the NBA to) give such an indemnity as a price of NBA membership -- and if they therefore stand to be economically harmed if Mr. Furth does an effective job of litigating the remaining claims -- that is simply a risk which they agreed to accept. To argue that the legal interests of the parties have now become autagonistic rather than mutual -- and that therefore the Furth firm can no longer act for either side **/ -- is both cynical and begs the question. It is cynical because the expansion teams having "gotten theirs" no longer need Mr. Furth's services, whereas the need of these three economically weak franchises (now left alone to fight the even more entrenched NBA) has become especially acute. It begs the question because the only reason that there is now an asserted conflict of position is that four ex-ABA teams elected to get in bed with their former opposition. Whether they were free as a matter of substantive law to do so is a matter for another day; the point for present purposes is that their decision to do so should not be permitted to furnish the

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*/ (continued)

could no longer compete at all with the ABA. In the face of those unequivocal representations, the ABA teams' agreement to hold the NBA harmless against this potential multi-million dollar exposure is difficult to explain except as a requirement contrived to create the very ethical conflict now asserted. That is, of course, precisely what we contend is the case.

**/ In fact, however, Furth does continue to act for the ABA and against these plaintiffs. See p.13.

basis for requiring the resignation of plaintiffs' counsel. */

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*/ Furth's office also asserts that it does not, in fact, represent two of the three remaining franchises (Mountain States [formerly Salt Lake City] and San Diego) in this litigation, since it is not they but their predecessor franchises who are the actual parties. As an initial matter, that is substantively incorrect, since the present petitioners succeeded to the claims asserted here and are the real parties in interest. Moreover, even if the facts were otherwise, Furth concededly does represent these franchises in other litigation against the ABA, and is in fact the lawyer who has been retained to pursue all appropriate litigation against the NBA defendants. Since it is his clients' view that that representation should include resistin dismissal in this Court, Mr. Furth cannot avoid that obligation on technical grounds.

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We have begun this Memorandum with a discussion of the "representation" issue because, we believe that it is, in fact, central to an understanding of our position on this motion and in relation to NBA litigation generally. Plaintiffs contend that over the years since the ABA was formed, they have been injured and, ultimately, driven out of business, by the NBA's unlawful conduct. Because of vigorous pursuit of those claims before this Court and others by Mr. Furth and his colleagues (to whom such claims were entirely entrusted), four franchises have now been permitted to join the NBA and two others have been well-paid to forego that opportunity. That is, of course, their right.

What is not right, however, is that this partial settlement and merger should furnish the occasion either for a breach of fiduciary duties owed by and among the various ABA joint venturers or for the perpetration of still another predatory practice by the NBA and its four new participants.

Yet that is what we contend has been and is being attempted. The major, indeed the only, asset of these remaining franchises (and of the ABA itself, if one is to believe the tale of financial woe told to Judge Carter in New York), has been the litigation claims against the NBA. Those claims have (as described in the NBA's own moving papers) been pursued over some several years in various Courts. Vast discovery has been conducted throughout the country. See Supplemental Affidavit of Michael A. Cardozo, ¶10. Then, when that process was about to culminate in a trial, the partial settlement and "expansion," described above, were

reached.

As a result of that partial settlement the NBA, in a truly amazing legal coup, has gotten rid of its only competition through "expansion," required the newly absorved teams to pay it for that privilege, and also arranged for an indemnity by the ABA teams against any other liability or expenses in ongoing or future litigation. This last item had the effect, of course, of not merely making the expansion teams indifferent to the legal claims of their former ABA colleagues, but active opponents of them. It further "happens" to result in a claimed conflict of interest which now causes the lawyers who have represented the ABA and its member franchises over all these years to seek to withdraw -- after having been richly compensated for their efforts.*/

The net result of all of the foregoing is -- and, we submit, was intended to be -- that these three remaining plaintiffs (one of whom, Mountain States, is in receivership, and the other two of which are not much healthier) are now faced with the prospect of either losing entirely their last asset (the litigation) or of finding other counsel to start from the ground up.**/

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*/ Our information (which Furth and the ABA have refused to confirm or deny) is that plaintiffs' counsel have been or are to be paid 1.3 million dollars. If that information is correct, that would work out to nearly six full lawyer years at $150.00 an hour (much of the work, in fact, having been done by associates in Mr. Furth's firm).

**/ Mr. Furth's office has estimated that it would cost them another $200,000.00 in time to try the cases. One would

As far as we are concerned, the foregoing facts constitute a further separate offense by the NBA (or are, at least, evidence of a continuing violation). They further constitute a common law breach of fiduciary duty by the other ABA members and, perhaps, a joinder in the antitrust conspiracy of their former NBA opponents. Plaintiffs hope to be able to pursue those claims, as well as presently existing ones. However, their ability to do so -- indeed their ability to successfully oppose even the current run of motions in this and other Courts***/ -- is seriously threatened by the refusal of their lawyers to act further for them.

At the prior hearing in this matter, plaintiffs suggested that there is an analogy between the actions of the NBA/ABA teams here, and the settlement-procured destruction of the voluminous computer index in the Control Data/IBM litigation.****/ We believe that analogy to be apposite. There,

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**/ suspect that a new lawyer who had to learn the litigation from sratch would expend several times that amount in pursuing the matter.

***/ An obvious element of the NBA/ABA strategy is to move quickly and firmly now that Furth has been immobilized and the opposition is at an obvious disadvantage. Thus, they not only refused to continue the present hearing to permit discovery or even inspection of the voluminous files in the case, but even refused to consent to a ten-day continuance as a matter of professional courtesy until Special Counsel threatened to go to Court over the matter.

****/ That destruction is charged as a separate antitrust offense in several of the IBM antitrust cases now pending in this Court.

IBM, with its mammoth resources, required Control Data as a condition of settlement to destroy its valuable index and analysis of IBM records, thus highly prejudicing other less-solvent litigants against it. Since Control Data was being well-rewarded for complying with IBM's request, it agreed to do so.

So here, defendants have artfully attempted to create a situation requiring the Furth firm to request withdrawal from this litigation -- all to the great prejudice of the remaining plaintiffs.

In both cases, this "loss" is not inherently irremedial. Theoretically, a new index and analysis could be created by IBM's opponents. Similarly, here, while Mr. Furth is a very skilled antitrust lawyer, his talents are not unique. However, the problem in both instances is that, as a practical matter, the sheer burden of attempting to duplicate the work done makes replacement extremely difficult if not impossible for the economically strapped plaintiffs -- as the defendants in each instance well knew.

* * * * *

Where does that leave matters in terms of the present motion to dismiss? Plaintiffs will attempt, within the limited range of information known or available to them, to respond to the points made by the NBA in their moving papers.*/ What plaintiffs, suggest, however, is that the representation issue

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*/ One problem with attempting to do so is that, even if plaintiffs had an opportunity to fully review and digest all the relevant file materials, much of what is pertinent to addressing such issues as why matters were prosecuted as and

should be decided before any final hearing is held on the dismissal motion.**/

If Mr. Furth is to remain in the case -- as we believe he should -- then he can fully respond. If, on the other hand he is permitted to withdraw, a suitable "start-up" period should be provided to new counsel so that they can adequately present an opposition to the dismissal motion.

ARGUMENT

The NBA advances four principal arguments in support of its motion to dismiss: (1) that the plaintiffs released or agreed to dismissal of their claims in this action in connection with a supposed "settlement" in 1971;" (2) that plaintiffs' claims are more properly pursued in a pending New York action; (3) that plaintiffs' claims are barred by res judicata in view of a prior order in the New York action and (4) that plaintiffs' claims in this Court should be dismissed for lack of prosecution.

While, as noted above, it is presently impossible for anyone other than plaintiffs' current counsel to respond adequately to these assertions, a partial response is as follows:

(1) That the Plaintiffs Released Or Agreed To Dismissal of Their Claims In This Action In Connection With A 1971 Settlement.

The NBA urges that this action should be dismissed

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*/ (continued)

where they were, and why certain strategic decisions were made, etc. are known only to Messrs. Furth, et al.

**/ Unless the NBA/ABA parties are willing to concede the truth of all of our assertions, some limited discovery (by way of document production and depositions) may be necessary before that issue can be properly addressed.

because in 1971 the NBA and ABA supposedly agreed to settle their disputes and merge (as they have now done -- five years later -- pursuant to an entirely separate agreement from which these plaintiffs have been excluded). In connection with the 1971 agreement a document, commonly referred to as the "1971 merger agreement," was signed on May 7, 1971. It provided in part, as the NBA alleges, that the claims in this action were to be dismissed and that the two leagues would take all action necessary and appropriate (including seeking the enactment of enabling legislation) to permit the merger. Thereafter, as the NBA's affidavits also recite, dismissals were filed by some of the ABA teams though not by any of the three plaintiffs here (or their predecessors).

So far so good. But what the NBA/ABA presentation steadfastly fails to note is that the entire validity and effectiveness of the 1971 settlement was expressly conditioned upon the parties in fact merging prior to January 4, 1974. Thus, the 1971 merger agreement provided in paragraph 12 as follows:

> "Absent the enactment of the exempting legislation [permitting the merger] . . . on or before January 3, 1974, this Agreement shall terminate on January 3, 1974 and be null and void in all respects."

It is undisputed that no such legislation was enacted nor was the merger effected. It should therefore be equally undisputed that whatever pertinence the 1971 agreement might have had at one time, it has none today.*/ Indeed, even if one

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*/ Furthermore, it is also conceded that some teams

assumes arguendo that the NBA might previously have sought to enforce the alleged agreement to file dismissals (which we dispute), that right died along with the rest of the 1971 merger agreement in January, 1974.

The NBA/ABA's **/ moving papers also note that further antitrust actions were filed after the January 1974 expiration of the 1971 merger agreement. However, they again omit to state that one of the claims in the subsequent actions is that the 1971 merger agreement was in fact procured as part of the NBA's on-going antitrust conspiracy and/or as an intentional fraud upon the ABA and its member teams. See, e.g., Exhibits D and F to Supplemental Affidavit of Michael A. Cardozo (October 15, 1976). Although the full circumstances surrounding these events are known only to plaintiffs' counsel of record and to former ABA representatives (such as Messrs. DeBusschere and Carlson), the very least that can be said is that there is no basis for implying the existence of a dismissal where none in fact exists.

(2) That Plaintiffs' Claims Should Be Pursued in New York.

The NBA/ABA defendants also argue that plaintiffs' claims should be pursued, if at all, in New York in connection

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*/ (continued)

never even participated in the 1971 agreement and therefore were not dismissed by anyone. The NBA's argument is, to that extent, without basis for entirely independent reasons.

**/ Lest there be any doubt that the ABA as well as the NBA now wants this action dismissed, it has filed papers through the offices of Frederick P. Furth in support of that position. See, e.g., Affidavit of David A. DeBusschere.

with a procedurally more advanced action which was filed there as an off-shoot of the so-called "players" cases. Robertson v. NBA, 70 Civ. 1526 RLC (S.D.N.Y.) Since the NBA defendants also assert that Judge Carter has already disposed of plaintiffs' claims (see point 3 below), their motivation in making this argument is, certainly, understandable. The argument, however, is unpersuasive.

Plaintiffs agree that there is a pending action in New York in which much action has taken place. Indeed if, as the NBA asserts, there have been 45,000 pages of testimony taken from 143 witnesses over 252 days (plus voluminous other discovery), */ such facts merely serve to underscore plaintiffs' point about the urgency and necessity of retaining their present counsel.

Plaintiffs also agree that ultimately these cases should probably be tried in one forum. **/ However, whether that forum should be New York, San Francisco, or some other place cannot now fairly be determined. If Mr. Furth remains as counsel, plaintiffs will want the benefit of his experience and judgment. If he does not, then other counsel will have to determine whether to oppose consolidation as well as where these actions should be tried. While New York has been the site of the recent activity, it is far from clear that plaintiffs' claims should continue to be pursued there, rather than here.

For example, since Mr. Furth, as well as his voluminous

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*/ Cardozo Supp. Aff. ¶¶10, 19.

**/ Or, at least, that no single plaintiff should be pursuing claims in more than one place.

files, are presumably located in San Francisco, access to him and to them by new counsel will be far easier here. Also, New York is not the forum initially selected by plaintiffs. San Francisco is. Both this action and two subsequent ones were filed here. The fact that the active ABA litigation ended up in New York at all relates solely to Judge Carter's control over the so-called "players" actions, and his consequent preliminary injunction against the ABA's continuing prosecution of its 1974 suit in this Court. */ That injunction led to dismissal of the San Francisco suit without prejudice and to its subsequent assertion as a cross-claim in New York. However, since the players' cases have now been settled and dismissed, it may well be that a motion to transfer the remainder of the ABA cases (i.e., the claims of these plaintiffs) under 28 U.S.C. §1404(a) should, and would, be granted. We deem this particularly likely in view of the showing of hardship which plaintiffs believe they can adduce in support of such a motion.

In any event, our point for present purposes is simply that the issue of New York versus San Francisco should be deferred until other matters are sorted out, and that there is certainly no basis for a dismissal of plaintiffs' claims on this ground at the present time.

(c) That Plaintiffs' Claims Are Barred By Res Judicata in View of a Previous Order in the New York Action.

Defendants' third point is closely related to their second. They want these claims in New York because they are confident that Judge Carter won't let them be pursued there.

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*/ Cardozo Supp. Aff. ¶5, Exh. D and E.

In fact, they contend that he has already so ruled, and that the doctrine of res judicata therefore applies. See Cardozo Supp. Aff. ¶14-18, Exb. I-K.

Not having directly participated in those proceedings, plaintiffs are in no position to argue the merits of that ruling or even to dispute the NBA's characterization of it. That, once again should be done by plaintiffs' counsel who are, presumably, able to do so.

Yet, even without benefit of this knowledge, it is clear that defendants' res judicata argument is wrong on at least one ground. At best, Judge Carter has granted a partial summary judgment in defendants' favor with respect to certain claims accruing prior to September 1, 1972. That order is, by the language of Rules 54(b) and 56 not only not a judgment but is expressly "subject to revision at any time before the entry of judgment." As such, it demonstrably does not meet the necessary condition of "finality" requisite to a res judicata plea. See, e.g., G & C Merriam Co. v. Saalfield, 241 U.S. 22, 28 (1916) (it is "familiar law that only a final judgment is res judicata"); American Nat. Ins. Co. v. Lin Shee, 104 F.2d 688, 692 (1939) ("No question becomes res adjudicata until it is settled by final and conclusive adjudication); cf. Premier Elec Constr. Co. v. Miller-Davis Co., 422 F.2d 1132 (7th Cir. 1970).

Beyond that fatal deficiency, it is also scarcely clear how these plaintiffs, who have never dismissed any claims against the NBA, could somehow be barred from pursuing their claims because of what other parties may have done. Compare Cardozo Supp. Aff. ¶14. Indeed, as noted earlier, the instrument under which such a claim could be asserted

lapsed and became void, by its own terms, in January, 1974. The only basis for such a ruling which we can conceive is that the ABA was an agent empowered to act for all of its joint venture members in dealings with the NBA. If that be the theory, then these plaintiffs will forthwith ask their attorneys (Mr. Furth or otherwise) to file an appropriate motion to set aside the recent (1976) merger and settlement as authorized and in breach of the ABA's duties to deal equitably and equally on behalf of all ABA entities.

The NBA's final claim highlights most directly the need for plaintiffs' present counsel of record to appear and represent them. For while there are certain obvious answers to the NBA's contention (such as the hiatus caused by the 1971 merger agreement and the pursuit of companion litigation in New York), any assertion that these parties have been properly lax in this action ultimately relates to the conduct and tactical decisions of plaintiffs' counsel. We are confident that if such an explanation is required, Mr. Furth and his colleagues will be more than able to supply it. It is, however, properly their duty to do so, just as we contend that it is their duty to continue to pursue vigorously this litigation and others against the NBA.

CONCLUSION

For the reasons set forth above, plaintiffs respectfully request this Court to enter its order:

(a) Declaring that the firm of Furth, Fahrner & Wong is not disqualified from continuing to represent the remaining plaintiffs in this litigation and directing that they not be permitted to withdraw (provided that plaintiffs shall honor their commitment for the payment of fees and costs); and

(b) Denying the motion to dismiss.

In the alternative, plaintiffs request this Court to set the matters referred to above over for further hearing and that it further issue its Order to Show Cause why plaintiffs' attorneys should not be permitted and required to continue their representation of plaintiffs.

Dated: November 9, 1976.

Respectfully submitted,

STEPHEN V. BOMSE
HELLER, EHRMAN, WHITE & McAULIFFE

By STEPHEN V. BOMSE

Stephen V. Bomse

Special Counsel appearing for purposes of this matter only on behalf of Richard T. Eckles, Trustee in Bankruptcy for Mountain State Sports, Inc.; San Diego Professional Basketball Corporation and New Orleans Buccaneers, Inc.

EXHIBIT M TO AFFIDAVIT OF CARDOZO

CERTIFICATE OF SERVICE

I, Stephen V. Bomse, hereby certify as follows:

I am an attorney licensed to practice before the Bar of this Court; my business address is 44 Montgomery Street, San Francisco, California. On November 9, 1976, I caused a copy of the foregoing MEMORANDUM OF CERTAIN PLAINTIFFS IN OPPOSITION TO MOTION TO DISMISS AND ORDER TO SHOW CAUSE RE DISMISSAL to be served on the parties in the foregoing action by depositing said document in the mail at San Francisco, California, in sealed envelopes with postage prepaid thereon, addressed as follows (unless otherwise specified):

Robert S. Carlson, Esq.
Spengler, Carlson, Gubar, Churchill
& Brodsky
280 Park Avenue
New York, New York 10017

Frederick P. Furth, Esq.
Daniel S. Mason, Esq.
Furth, Fahrner & Wong
Russ Building, Suite 1330
San Francisco, California 94104

Michael A. Cardozo, Esq.
Proskauer, Rose, Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

John E. Krzywicki, Esq. (by causing copy of said document
Sullivan, Jones & Archer to be personally delivered)
Hallidie Building
130 Sutter Street
San Francisco, California 94104

Executed at San Francisco, California, this 9th day of November, 1976.

STEPHEN V. BOMSE

Stephen V. Bomse

ORDER GRANTING WITHDRAWAL OF COUNSEL

Feb 24, 1977

Application to withdraw is granted as indicated after oral argument in open court.

So Ordered.

Robert L. Carter

U. S. D. J.

U.S. DISTRICT COURT
FILED
FEB 24 1977
S. D. OF N. Y.

MICROFILM
FEB

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OSCAR ROBERTSON, et al., Plaintiffs, v. NATIONAL BASKETBALL ASSOCIATION, et al., Defendants.	:	
AMERICAN BASKETBALL ASSOCIATION, et al., Cross-Claimants, v. NATIONAL BASKETBALL ASSOCIATION, et al., Cross-Defendants.	:	70 Civ. 1526 (RLC)

NOTICE OF APPEAL

Notice is hereby given that R. T. Eckles, Trustee in Bankruptcy for Mountain States Sports, Inc., d/b/a Utah Stars, cross-claimant herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of Judge Carter, entered in this action on the 24th day of February, 1977, granting the application of Frederick P. Furth to withdraw as counsel for cross-claimant, R. T. Eckles.

Dated: New York, New York
March 1, 1977

WATSON LEAVENWORTH KELTON & TAGGART

By _____

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AND: All Counsel on Attached Exhibit A